No. 4122

United States
Circuit Court of Appeals
For the Ninth Circuit

THE MOHAWK RUBBER COMPANY, of New York, Inc., a Corporation,
Plaintiff in Error,
vs.
EDGAR J. MUNNELL *and* ARTHUR J. SHERRILL,
Individually and as co-partners doing business under the firm name and style of MUNNELL & SHERRILL,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR

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1. Controversy is three fold.

   (a) Whether note of $2633.36 dated Dec. 2, 1920, signed by defendants in error is discharged.

   (b) Whether defendants by delivery of tires in September, 1921, to American Tire & Rubber company became entitled to a credit of $9814.20 on their indebtedness to plaintiff or only to $1079.25 allowed by plaintiff.

   (c) Whether defendants by reason of the price decline of November 15, 1921, became entitled to a credit of $249.44 on their indebtedness to plaintiff or only to $111.68 allowed by plaintiff.

2. The determination of this controversy resolves itself into two questions:

   (a) Did the plaintiff through its agent, W. G. Fitzgerald, make the agreements which establish the three points above mentioned in favor of the defendants. Plaintiff insists that there is no evidence to show such agreements were made.

   (b) If he did make such agreements did he act under authority from his principal, the plaintiff, and or has his acts been ratified by the principal. Plaintiff insists that Fitzgerald had no such authority. It also claims that there could be and was no ratification of an agreement or agreements not made.

INDEX OF AUTHORITIES

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STATEMENT

Plaintiff sued defendant on three promissory notes each dated December 2, 1921, and being in the sum of $2,633.26 each, due respectively February 10, 1922, April 10, 1922, and May 10, 1922; said notes being the subject of the first, second and third causes of action respectively in its complaint. The fourth cause of action is on an open account for goods sold on which plaintiff claimed a balance due of $6,733.01. Interest is asked on the various sums and attorney fees on the note.

Defendants answered admitting execution of notes and amount of goods sold.

The first separate answer to the first cause of action alleges agreement for protection against price decline in tires and a credit to be given therefor on said decline. Also that exclusive agency held by defendants was by plaintiff given to American Tire & Rubber Company, and that at plaintiff's request and with its consent stock of tires held by defendants of agreed value of $9,814.20 was turned over to said tire and rubber company, which, together with a rebate of $249.44 on decline of November 15, 1921, was to be credited on sums represented by note in first and note in second causes of action and on open account stated in fourth cause of action, leaving a balance of $387.40 due from defendants to plaintiff, which defendants tendered and brought into court.

The second separate answer to the second cause of action states the same matters and with tender constitute alleged defense to second cause of action.

The fourth separate answer to the fourth cause of action states the same matters and with tender constitute alleged defense to fourth cause of action.

The third separate answer to the third cause of action alleged agreement at time notes were signed and goods returned for unlimited price protection and credit agreement in event price was cut. That on May 12th, 1921, the price was cut, there being a decline in tires to the extent of 20%, and defendants became entitled to

a credit and they forwarded an inventory with a request for credit, and defendants agreed to give credit to the amount of the third note, and that the note mentioned in third cause of action should be deemed and treated as fully paid, satisfied and discharged.

Upon these issues the case went to trial.

When the evidence was submitted and both parties had rested, the plaintiff made a motion for directed verdict (Trans. p. 517) setting forth the following grounds:

1. That plaintiff has established a prima facie case, and that no issue had been raised by the evidence with respect to any material allegations of the complaint.

2. That the defendants have failed to establish by competent evidence any of the defenses set forth in their answer.

The case as made resolves itself into three sub-divisions:

1. Whether by reason of a decline in tires announced May 10, 1921, it was agreed that the note set up in plaintiff's third cause of action should be treated as fully paid, satisfied and discharged.

2. Whether the tires turned over to the American Tire & Rubber Company in September, 1921, amounting to the sum of $9,814.20, should be credited on the indebtedness of defendants to the plaintiff.

3. Whether the defendants should be given a credit in the sum of $249.44 by reason of the decline announced on November 15, 1921, instead of the sum of $111.68 allowed by plaintiff.

Plaintiff filed a motion for a new trial, alleging among other things insufficiency of the evidence to justify the verdict, (Trans. p. 531) and in its assignments of error claims that there is no evidence to show that its Pacific Coast Manager had authority to make and bind plaintiff by the contracts alleged in the answer; that there is no evidence in the record to establish the contracts alleged in the answers, and that there is a variance between the evidence and the contracts pleaded.

LEGAL PROPOSITIONS

I.

Agency and the authority of the agent may be proved by the testimony of agent on witness stand.

Hinton vs. Roethlar, 90 Ore. 440, 7; 177 Pac. 59.
Larkin vs. Carstens Packing Co., 80 Or. 104, 106; 156 Pac. 578.

II.

Agent has power to do all things *incidental* to the carrying out of his expressly authorized powers.

Bauer vs. Northwest Blow Pipe Co., 75 Or. 1, 6; 146 Pac. 129.

III.

The granting or the refusal to grant a new trial is within the sound discretion of the district court, and is not subject to review in the circuit court of appeals.

Goff vs. U. S., 281 Fed. 822, 823; C. C. A. 8th Cir.

Yellow Cab Co. vs. Earle, 275 Fed. 928, 930; id. (Cer. Den. 255 U. S. 624, 66 L. Ed. 797.

Greenburg vs. U. S., 285 Fed. 865, 866; id.

Slip Scharff Co. vs. W. M. Filene's Sons Co., 289 Fed. 641, 646; C. C. A. 1st Cir.

Adams Express Co. vs. Darden, 286 Fed. 61, 68, C. C. A. 6th Cir.

IV.

The assignment of error should be definite, it should show in what the alleged error consists, and the substance of what occurred at the trial which it is claimed constitutes error should be set forth. The court is not required to search the record.

Piper vs. Cashell, 122 Fed. 614, 618, C. C. A. 9th Cir.

S. S. Co. vs. U. S., 142 Fed. 315, 318, C. C. A. 8th Cir.

City of Grafton vs. Gentry Bros. Shows, 240 Fed. 646, 648, C. C. A. 4th Cir.

H. E. Winterton Gum Co. vs. Auto Sales Gum & Chocolate Co., 211 Fed. 614, 618, C. C. A. 6th Cir.

Cisco vs. Looper, 236 Fed. 336, 338, C. C. A. 8th Cir.

R. D. Cole Mfg. Co. vs. Mendenhall, 240 Fed. 641, 643, C. C. A. 4th Cir.

This rule is violated by the plaintiff in error.

V.

Rulings of the court are not reviewed unless excepted to, and the errors excepted to must be specified in the assignment of errors.

Ana Maria Sugar Co., Inc. vs. Quinones, 251 Fed. 499, 504, C. C. A. 1st Cir.

United Verde Extension Co. vs. Koso, 273 Fed. 369, 373, C. C. A. 9th Cir. (Aff. 254 U. S. 245, 251, 65 L. Ed. 246, 249.

Wear vs. Imperial Window Glass Co., 224 Fed. 60, 63, C. C. A. 8th Cir.

Goldfarb vs. Keener, 263 Fed. 357, 359, C. C. A. 2nd Cir.

Mound Coal Co. vs. Jeffrey Mfg. Co., 233 Fed. 913, 918, C. C. A. 4th Cir.

International Lumber Co. vs. U. S., 231 Fed. 873, 875, C. C. A. 8th Cir.

Netherlands American Steam Nav. Co. vs. Diamond, 128 Fed. 570, 574, C. C. A. 2nd Cir. (Syllabus 2.)

Chicago B. & Q. Ry. Co. vs. Frye Bruhn Co. 184 Fed. 15, 18, C. C. A. 8th Cir.

Skeele Coal Co. vs. Arnold, 200 Fed. 393, 395, C. C. A. 2nd Cir.

This rule is violated by the plaintiff in error.

VI.

Rule same in Oregon courts and according to Oregon practice.

Bagley Co. vs. International Harvester Co., 99 Or. 519, 524, 195 Pac. 348, 349.

Douglas Creditors Ass'n. vs. Hutcheson, 81 Or. 644, 645, 160 Pac. 539.

VII.

On the trial of the cause, the court sustained objections to the admission of testimony; an offer of proof was made and the matter argued to the court, defendant claiming that the evidence was admissible, and that the statements constitute error.

Defendant had a right to argue the admissibility of evidence to the court and it was *necessary* in order to preserve *their rights* to make an *offer of proof.*

Victor Talking Machine Co. vs. Straus, 280, Fed. 717, 718, C. C. A. 2nd Cir.

Sun Publishing Co. vs. Lake Erie Asphalt Block Co., 157 Fed. 80, 82, C. C. A. 8th Cir.

Camp Mfg. Co. vs. Beck, 283 Fed. 705, 6 C. C. A. 4th Cir.

VIII.

Under the Conformity Act, where it is necessary to

make an offer of proof in the State court, it is necessary to make it in the Federal court.

Shauer vs. Alterton, 151 U. S. 607, 616, 38 L. Ed. 288.

Buckstaff vs. Russell, 151 U. S. 626, 39 L. Ed. 292, 296.

Kansas City S. R. Co. vs. Jones, 241 U. S. 181, 2, 60 L. Ed. 943, 945.

IX.

Under practice in Oregon state courts it is necessary to make an offer of proof where an objection is sustained unless the question clearly indicates what the expected answer will be, which is not the situation in the case at bar.

Booth Kelley Lumber Co. vs. Williams, 95 Or. 476, 482-4, 188 Pac. 213, 215.

Hill vs. McCrow, 88 Or. 299, 309, 170 Pac. 307, 309.

Columbia Realty Investment Co. vs. Alameda Land Co., 87 Or. 277, 293-6, 168 Pac. 440.

Ashmun vs. Nichols, 92 Or. 223, 231, 178 Pac. 234, 236.

X.

Each error shall be *separately* stated in the assignment of errors, as well as particularly asserted.

Rule 11 of the Rules of this court.

Savage vs. U. S. 270 Fed. 14, 20, C. C. A. 8th Cir.

Davidson S. S. Co. vs. U. S., 143 Fed. 315, 318.

Empire State Cattle Co. vs. Atchison T. & S. F. Ry. Co. 147 Fed. 457.

Smith vs. Hopkins, 120 Fed. 921, 923.

Herrington vs. U. S., 267 Fed. 77, 104 (8), C. C. A. 8th Cir.

Simpkins Federal Practice, (Rev. Ed.) p. 190.

This rule is violated by plaintiff in error.

XI.

It is well settled that on objection that there is a variance between the allegations of the pleading and the proof must be taken at the time the evidence *is offered,* otherwise it will be deemed to have been waived.

Preiss vs. Zitt, 148 Fed. 617, 618, C. C. A. 8th Cir., citing:

Nashua Savings Bank vs. Anglo Amer. Co., 189 U. S. 221, 231, 47 L. Ed. 782.

Roberts vs. Graham, 6 Wall. (U. S.) 578, 18 Ed. 791.

Thompson Sterrett Co. vs. Fitzgerald, 149 Fed. 721, 723, C. C. A. 7th Cir.

Phoenix Securities Co. vs. Dittmar, 224 Fed. 892, 895-6, C. C. A. 9th Cir.

Twin City Fire Ins. Co. vs. Stockmen's National Bank, 261 Fed. 470, 474, C. C. A. 9th Cir.

XII.

A pleading is aided by the verdict where the pleading is not attacked by demurrer or otherwise in the court below.

Duluth R. R. Co. vs. Speaks, 204 Fed. 573, 576, C. C. A. 8th Cir.

XIII.

A motion for a directed verdict *admits the truth* of the evidence given by the party against whom it is directed.

Sherman Clay vs. Buffman & Pendleton, 91 Or. 352, 360, 179 Pac. 352.

XIV.

Unless the party against whom the motion for a directed verdict is made is *wholly without a cause of action or defense,* the omission of a material allegation from a pleading does not assist the motion. If the evidence, *accompanied by a good pleading*, is sufficient to establish the cause of action or defense, (if believed by the jury), a motion for a directed verdict should be denied. Under the verdict herein appellant cannot urge that the evidence does not establish the averments of the answer.

Ridley vs. Portland Taxicab Co., 90 Or. 529, 533-5, 177 Pac. 429, 430-1.

Emmons vs. Southern Pacific Co., 97 Or. 263,

295, 191 Pac. 333, 343.

Parks vs. Keeney, 105 Or. 277, 279, 209 Pac. 497 (in which case there was no action stated at all, the exception therefore being revoked).

XV.

In Oregon courts, the court is without power to take a case from the jury, or to set aside a verdict of a jury if there is *any evidence*, however weak in probative value, to support the verdict.

Article VII, Section 3c, Oregon Constitution.

Kahn vs. Home Tel. & Tel. Co., 78 Or. 308, 317, 152 Pac. 240, 242.

Reed vs. National Hospital Assn. 106 Ore. 471, 482, 212 Pac. 537, 541 (3).

Southern Oregon Orchards Co. vs. Bakke, 106 Or. 20, 25, 210 Pac. 858, 860 (1).

Mitchell vs. S. P. Co., 105 Or. 310, 317, 209 Pac. 718, 720 (4).

Derrick vs. Portland Eye, Ear, Nose & Throat Hospital, 105 Ore. 90, 98 (4), 209 Pac. 344, 347 (4).

Doherty vs. Hazelwood Co., 90 Or. 475, 478, 175 Pac. 849.

XVI.

On writ of error the court is not concerned with the *weight* of the evidence.

Toledo St. L. & W. R. Co. vs. Howell, 191 Fed.

776, 780, C. C. A. 6th Cir.

XVII

If the statutory rule in the Oregon courts will not be applied to the verdict in a federal court, yet this court will invoke the rule of the Federal courts, which are not applying the rule of the state courts, that the court must consider the evidence most favorably on a motion for a directed verdict; and it is *only* when *all* honest men, in the honest exercise of a fair, impartial judgment, would draw the *same* conclusions from the facts which condition the issue, that it is the duty of the court to withdraw that question from the jury.

> Hobbs vs. Kiser, 236 Fed. 681, 682, C. C. A. 8th Cir. Citing numerous authorities from the supreme court and lower federal courts.

In this case the trial judge did not hesitate at all in finding that the evidence required the submission of the case to the jury.

XVIII.

The jury's findings on conflicting evidence is conclusive.

> Hobbs vs. Kiser, supra, p. 685.

XIX.

This conclusion becomes practically *conclusive* in view of the fact that appellant was entirely satisfied with

the court's charge to the jury, and made no objection and saved no exception to any portion thereof. The court instructed the jury as favorably to the appellant as the law and facts required.

Carolina C. & O. Co. vs. Stroup, 239 Fed. 75, 79, C. C. A. 6th Cir.

XX.

A principal cannot ratify a part of an alleged unauthorized contract without ratifying the whole; a principal cannot accept the benefits without bearing the burdens.

Bauer vs. N. W. Blow Pipe Co., 75 Or. 1, 5, 146 Pac. 129, 139 (1-4), citing cases.

Depot Realty Syndicate vs. Enterprise Brewing Co., 87 Ore. 560, 575 (7), 171 Pac. 223, 224, (2), citing authorities.

XXI.

It is good pleading to allege that an act was done by the principal and it is competent to prove that averment by showing that the act was merely done by the agent of the principal thereunto duly authorized, or that it was afterwards ratified by the principal.

Marsters vs. Walker, 89 Or. 526, 529 (2), citing cases.

Hinton vs. Roethler, 90 Or. 440, 448; 177 Pac. 59, 61 (4).

Scandinavian National Bank vs. Wentworth Lumber Co., 101 Ore. 151, 157; 199 Pac. 624, 626 (5).

ARGUMENT

In view of the motion for directed verdict and the assignments of error in reference to insufficiency of evidence, we deem it advisable to analyze the testimony submitted by the defendants, and also call attention to some of the evidence of plaintiff, which we claim supports the position taken by the defendants.

ANALYSIS OF EVIDENCE

Mohawk Rubber Company was a manufacturer of automobile tires, and for a considerable period prior to June 19, 1919, the defendants, who were distributors of tires, had had business relations with the manufacturers. (Trans. p. 403.)

Business relations prior to December 2, 1920—The parties, in the spring of 1919, undertook to get the arrangement upon a more definite basis. (Trans. p. 403.) A conversation was had with Mr. Fitzgerald, and the plaintiff wrote a letter, dated June 18, 1919, to the defendants (plaintiff's Exhibit F), under which the plaintiff turned over to the defendant as distributors the State of Oregon and certain territory in Washington and Idaho. It was also conditioned that the defendants open a retail store in Portland to sell Mohawk tires. The agreement was to expire by limitation on September

1, 1919, but could be renewed by mutual agreement in writing. No written agreement of renewal was ever made, and from September 1, 1919, on the contract between the parties must be ascertained from the correspondence and the understandings and agreements entered into between the plaintiff and the defendants, or their respective agents. The negotiations between the two parties naturally divide themselves into two periods, the first period preceding December 2, 1920, the second period being subsequent to that date. The plaintiff and defendants offered in evidence a large number of letters and telegrams, and it is necessary in the consideration of this case for the court to keep in mind the dates of these letters and telegrams and the situation before and after December 2, 1920.

Plaintiff's Exhibits F to Z inclusive, AA to MM inclusive, and defendants Exhibits 1, 17 to 28 inclusive, all relate to the business situation as it existed before December 2, 1920, when the promissory notes sued upon in this case were made.

With reference to the conditions as they existed before December 2, 1920, as shown by the correspondence, the court should read the exhibits in the order that the various letters and telegrams were sent by the respective parties, that order being as follows:

Plaintiff's Exhibits F, G, H, I, J, K, L, M, N, R, defendants' Exhibits 17, 18, 19, 20, plaintiff's Exhibit O, defendants' Exhibit 21, plaintiff's Exhibits P, Q, R, S, T, U, V, defendants' Exhibit 22, plaintiff's Exhibit W,

defendants' Exhibit 23, plaintiff's Exhibits X, Y, Z, defendants' Exhibit 24, plaintiff's Exhibits AA, BB, defendants' Exhibit 25, plaintiff's Exhibit CC, defendants' Exhibit 26, plaintiff's Exhibit DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, defendants' Exhibits 1, 27, 28.

This correspondence shows that the defendants, who undertook to act as distributors for the plaintiff, purchased a large amount of tires involving a considerable sum of money. Several conditions contributed in making it difficult for the defendants to take care of the account existing between it and the plaintiff. These conditions were a gasoline shortage, which occurred during the year 1920, bad weather conditions, the rainy weather having started in October, and raining continually for many weeks, rumors that other tire companies were going to reduce the price, which stopped a buying, and difficulties which the defendants had with *its dealers* in keeping the tires sold. These elements will be noted more fully in the testimony.

Plaintiff's Exhibits G and H show that the defendants sold about $10,000.00 worth of tires to Clark & Mills; the tires did not stay put and were returned to defendants.

Plaintiff's Exhibit K seeks to show its philanthropy in that it sent these tires to the defendants at the old price. The record shows that the tire companies had the habit at stated intervals of raising or lowering the price of tires.

Munnell and Sherrill, as distributors, had been working for some time to line up Clark and Mills at The Dalles, and also to get them to open a retail store in Portland. These negotiations were known to Fitzgerald, the Pacific Coast Manager, and negotiations were consummated as to The Dalles territory shortly after plaintiff announced a raise in its price, and the plaintiff requested that this $10,000.00 order should go in at the old list.

The conditions which the defendants faced, and which caused a large amount of tires to accumulate in its possession, and which it was unable to sell, are reflected in the testimony in the exhibits on the following pages of the transcript:

Exhibit O, (page 143), Exhibit P, (page 145), Exhibit 21, (page 297), Exhibit S, (page 151, second paragraph.) Exhibit V, (page 157). Though the plaintiff states that the reason for the trouble in a *majority of the cases* is not with the tires, it would indicate that in something *less than* 50% of the cases that the trouble was with the tires.

In reference to the tires sold to Miles & Clark, Sherrill testifies:

"We had to take them back, yes." (Trans. p. 136.)

Exhibit YY, (page 223, second paragraph), Exhibit YY, (page 224, fourth paragraph), Exhibit 21, (page 297), the testimony reflects to some extent the

conditions faced by the defendants and which caused the accumulation of tires in its hands.

In Exhibit 17, (Trans. p. 291), in a letter dated June 2, 1920, defendants state that the tire condition is bad, the gasoline shortage has scared the dealers away and cut down local consumption, every day brings hard luck stories from the dealers who still have stocks on hand, and in some cases, service stations have closed entirely; that defendants have been forced to give a longer discount than that covered on account of similar policy of the company when they worked defendants' territory direct from the factory.

Exhibit 19, (Trans. p. 295), letter dated June 23, 1920, defendants state that business is simply shot to pieces, they have had to take back most of the tires they sold on account of customers being unable to meet their payments.

Exhibit O, (Trans. p. 143), dated June 26, 1920, defendants state that they have been receiving more tires back from their customers during the past thirty days than they have sent out and find themselves loaded to the guards with stock. They state that they must have sufficient time to dispose of the tires, or have them taken off their hands, as there is no tire business in defendants' territory.

Exhibit 21, (Trans. p. 297), dated June 29, 1920, enclosed a letter from Miles & Clark stating that they have

had poor luck with the tires they have used on their own machine so far. Defendants also state they are having a pretty tough time with the tire line, the usual state of affairs is reversed, they are now receiving 85% of the tires back instead of having the amount stay sold, and they are now confronted with a situation like that of Miles & Clark, "who have several thousand dollars worth of tires, most of them unpaid for, and who are likely, with the advent of defective tires to return their stock any day"; that the situation is so bad they have found it advisable to take the tires back rather than extend additional credits, as it is advisable to have the tires in the stores rather than doubtful accounts with the dealers, that the factory must help out in the matter, either by an extension of credits or must relieve defendants of part of the stock.

Exhibit P, (Trans. p. 145), "More tires are coming back from the customers than we are sending out," and defendants are doing this rather than lose the tires as the country dealers are hard hit by the conditions.

Exhibit Q, (Trans. p. 147). Fitzgerald refers this matter to the factory.

Exhibit T, (Trans. p. 154), written from the home office July 8, 1920, plaintiff states: "We realize fully the conditions you are bucking up against right now, for *they are not peculiar to your section* of the country, but exist all over with greater or less extent." The letter states then that the conditions seem to be bettering.

Plaintiff's Exhibit U, (Trans. p. 157), dated July 15, 1920, shows that two trade acceptances maturing in August and September, amounting to $4,908.17 each, were sent to defendants.

Exhibit V, (Trans. p. 157), dated August 27th, shows defendants were having hard work to collect the money to take care of the August trade acceptance, stating, "Have more tires in stock than 60 days ago account returns from dealers, and prefer to return some stock to 'Frisco if acceptable."

Defendants' Exhibit 22, (Trans. p. 300), a telegram of September 29, 1920, to plaintiff is to the effect that when Fitzgerald was in Portland he promised to let defendants know what disposition to make of the tires that they wished to return, and they wished instructions as to where to send them.

Exhibit W, (Trans. p. 158), a letter of October 15, 1920, from defendants, confirming 'phone conversation, states the tires they desire to ship. Letter refers also to conditions being uncertain on account of decline rumors which has stopped the tire business all together, and that the return of the stock is the best way to reduce the open account.

Exhibit 23 (Trans. p. 302), a letter from defendants to the home office dated October 18, 1920, states there is nothing left to happen to the tire business; that when the gasoline situation eased up, instead of having the

usual fall weather it rained for six weeks, that some of the tire companies had been reducing on account of rumors of other reductions, they state they are corresponding with the 'Frisco branch for shipping instructions as to the over-supply of stock.

Plaintiff's Exhibit X, (Trans. p. 160), dated October 19, 1920, is in answer to plaintiff's Exhibit W. The letter states that they are sending their men after future business with spring dating terms for payment in March, April and May; that the matter of price protection is before the Federal Board of Trade and is subject to its decision. "At the present time our plan is to guarantee against price reduction up to and including May 10th."

Plaintiff's Exhibit Y, (Trans. p. 163), is a letter from the home office attempting to quiet apprehensions and other rumors of price declines. The letter also states: "So far as price guarantee is concerned we have always protected all goods on hand unsold purchased within 60 days of the price change. Whether that will continue will depend upon the Federal Trade Board."

Plaintiff's Exhibit Z, (Trans. p. 167), is a letter written by defendants October 21, 1920, explaining the situation and stating that unless they hear from the company they think it best to ship a large quantity of tires to plaintiff at San Francisco.

Plaintiff's Exhibit AA, (Trans. p. 169), a letter of October 30, 1920, from the plaintiff, stating that their

salesmen have begun to solicit spring dating orders and that the terms to the dealers will be one-third payment March 10th, one-third payment April 10th, one-third payment May 10th. The letter further states, "We are guaranteeing prices on spring datings up until May 10th," stating that this is subject to the action, however, of the Federal Committee of Trade Relations, that if the Committee withdraws price protection the company must abide by it. The letter states: "We would suggest that you have your salesmen start soliciting spring business at as early a date as possible, and you, of course, can extend to your dealers the same protection which we are giving you." Adding, to have the salesmen impress on the dealers that the price protection is contingent upon the action of the Federal Committee.

Exhibit 24, (Trans. p. 303), is a letter dated October 26th, 1920, to the defendants from the home office. This letter has some important statements in it, as it further tends to confirm to the contention of the defendants that under the agreement with the company they had a right to return the tires, and also is a recognition of the conditions which Munnell & Sherrill were facing, which were clearly not the fault of defendants. The letter states: "We are certainly sorry to hear that conditions, instead of improving this fall, have taken a turn for the worse. *There is a jinx on the tire business this year.* We still feel as we did a year ago when we told you we would rather have you keep the surplus stock which you have and take care of your account as you can than to have

you further put to the expense and trouble of returning a lot of tires to San Francisco."

Exhibit 25, (Trans. p. 304), is a telegram from defendants to plaintiff, dated November 3rd, 1920, stating that defendants are ready to return sufficient tires to cover open account as agreed with Fitzgerald, but it is suggested to hold them for shipping instructions from factory. Defendants agree to warehouse the tires until plaintiff wishes them shipped, if necessary, to get accounts straightened. This is the same telegram offered in evidence as Exhibit CC, page 175. The answer to this telegram is Exhibit 26, (Trans. p. 305), directing the defendants to hold tires; that a letter follows. This is the same telegram as Exhibit DD (Trans. p. 176). The letter following the telegram is Exhibit EE (Trans. p. 176), dated November 4th. This letter explains that the company desires defendants to hold the tires and attempt to dispose of them, and that thereby the large expense incident to returning the tires for credit would be eliminated. The letter states that conditions are dull, but advises them to sell the tires at an attractive price and turn the tires into cash.

Exhibit FF, (Trans. p. 178), follows up the telegram of November 3rd.

In Exhibit BB (Trans. p. 174), dated November 1, 1920, the plaintiff states,"You probably know that we do not accept returned goods to offset current accounts or obligations incurred on the basis of a straight sale."

Defendants, in answer to this telegram, wrote Exhibit GG, (Trans. p. 180), and referred to the fact that they had a very definite agreement with plaintiff under which they could sell tires at the old list, and could exchange such of their stock as they were long on; "We have gone ahead on this matter with assurance from you that we could return this stock. We believe that it is the only way out of it." They will warehouse the goods if desired.

Exhibit HH, (Trans. p. 183), is a telegram from defendants dated November 8, 1920, stating that there is no other recourse but to return the stock per original agreement with San Francisco; that the public is not interested in tires at any price. In answer to this, plaintiff sends a telegram on November 9, 1920, Exhibit 88, (Trans. p. 183), claiming defendants cannot return tires, that letters written by 'Frisco do not indicate any such agreement, notifies defendants that Fitzgerald will soon call.

The telegram was followed by a letter of the same date, Exhibit JJ, (Trans. p. 184), which claims that the correspondence from 'Frisco indicates no right to return goods.

On November 10, 1920, Fitzgerald writes a letter to the defendants, Exhibit KK, (Trans. p. 188), in which Fitzgerald states that the matter of returning stock for credit to offset the debits is up to the Credit Department at Akron. The letter further states: "You must not for-

get that the writer's authority with this company is limited to certain matters such as the selling of goods, *territorial arrangements, etc.*, but when it comes to credits, return of unsold merchandise, and things of that caliber, then you are dealing with our Credit Department, because after we have made a sale of goods then the matter passes out of our hands into those of the Credit Department at Akron. We have no authority to take action in matters pertaining to their department." He advises the defendants to go after business, stating that the Mohawk is one of the lines that has survived present year conditions, stating how one company at Fresno in the future will devote their efforts to *quality merchandise* and have selected Mohawks. Defendants are advised to retain any surplus stock that they have at present as they will need it sooner or later.

On November 10th defendants telegraphed to plaintiff, Exhibit LL, (Trans. p. 192) as follows: "Have no desire to return stock which will involve $35000.00 but enough to reduce our open account and relieve us of an over-supply certain sizes. This is according to agreement with Fitzgerald, and we request quick action."

The Mohawk Company wired back on November 11th, Exhibit MM, (Trans. p. 193) as follows: "Have no record of agreement to accept additional sizes nor has Fitzgerald, as indicated by his recent letters to you, but cite our letter of November 9th." Advises them not to worry about reduced prices.

Under this condition of affairs and the controversy

as indicated, Fitzgerald made a trip to Portland as promised in his letters and as stated by the factory at Akron, and it is at this point that matters take shape which resulted in the controversy involved in this action. An adjustment was made, and we desire to show what that adjustment was.

During the trial of this suit evidence was introduced as to the accounts as shown by the books of the plaintiff and the books of the defendants. The account as shown by the ledger of the defendants is given on pages 396, 397 and 398 of the transcript. The account as shown by the books of the plaintiff is given on page 468 of the transcript. (Exhibit JJJ.) The credits as shown by the books of plaintiff are given on pages 43, 44, 45 and 46 of the transcript. (Exhibits A and B.)

Price Protection on Stock Retained December 2, 1920—On the trial of this case the defendants sought to establish that there was an agreement between the plaintiff and the defendants, which was made at the time the notes were executed and the goods returned, that plaintiff would protect defendants on the goods retained by them at that time against a future decline in price.

Plaintiff, after offering the deposition of Morris E. Mason, Vice-President and Sales Manager at Akron, called W. G. Fitzgerald, its Pacific Coast Manager, at San Francisco.

Fitzgerald testified that the first three credits shown

on Exhibit B, (Trans. p. 44) represented credits that defendants "had received prior to the time the notes were given," and were for merchandise returned. (Trans. p. 49.) He stated that the return of such goods was not part of the settlement that was had when the notes were given. He stated that the settlement was made between the defendants and the Akron office and not through Fitzgerald. (Trans. p. 50). That he did not arrange for the taking of the notes (Trans. p. 51) ; that the agreement was not placed with him at all. Q. "Was there any agreement made between you and them that they should give you these notes and return tires in settlement of the account?" A. *"No."* (Trans. p. 52.)

At first he was uncertain whether the notes were sent to the San Francisco Branch, but later testified: "These notes were sent direct to Akron but the tires were shipped to us at San Francisco. They were not part of the same agreement." (Trans. pp. 52 and 53). He stated his authority from his company is not in writing. (Trans. 54.) This witness seemingly in the beginning attempted to offset defendants' claim of a settlement at the time the notes were executed. He was then shown a telegram from his company to himself, which he had accidently left with defendants. (Defendants' Exhibit 1, Trans. p. 57.)

The *letter of November* 19 *therein referred to* was not produced, though request had been made and notice served on defendants to produce same. This testimony corroborates defendants' testimony as to the agreement. We suggest that a failure to produce the letter was be-

cause its effect would be detrimental to plaintiff. The producing of this telegram at the trial had the wholesome effect of making the Pacific Coast Manager more cautious in his statements.

When Mr. Fitzgerald arrived in Portland, the matter which is the subject of the correspondence herein above noted, came to a head.

Arthur J. Sherrill testified:

"A. We had an arrangement with Mr. Fitzgerald to return stock to San Francisco, to take care of our debts, as we were over-stocked, and along in the fall Mr. Fitzgerald came to Portland and took the matter up with us about retaining these tires, telling us that in all probability we would need that stock in the spring." (Trans. p. 59.) Mr. Sherrill also said:

"Mr. Fitzgerald said that no doubt we would need these tires in the spring. If we returned them to San Francisco we will have to go to the expense of sending them down there and bringing them back to Portland to use in our business in Portland the following year. So he —we decided in talking it over together—that the better way would be for us to leave these tires in Portland, and *so to make an entirely new deal*—we were to give him certain notes, or divide them up, as I recall it, in five different notes, and we were to retain the tires in Portland, with the exception of something like $6,000 worth of tires which were to be shipped to San Francisco. That was the matter—the way the matter stood when Mr.

Fitzgerald left Portland. It was with the understanding that we were to execute these notes and send them to him and ship the tires to him, and retain the rest of the tires after we had shipped the $6,000 worth to San Francisco." (Trans. p. 61).

Mr. Sherrill further testified:

"The matter of rebate or price protection came up at this time when we had this matter up with Mr. Fitzgerald, and I said to him, I said, 'Well, Bill, if we keep these tires and go out and take spring dating orders, what protection will we have?' And he said, 'You will have the same—the usual protection on spring dating orders, of course.' " (Trans. p. 66).

Sherrill explains what a spring dating order is:

"A spring dating order is an order that is taken in the fall or late winter, and enables the country merchant to buy his tires, have them delivered to him some time in December or January, and he pays for them in March, April or May, or April, May and June; there are different terms, but it is a dating order, and he is protected against price decline up to the period of his last dating month. For example, if he paid for his tires in May, he would be protected against price decline until May 10th, whatever the price may be. In other words, he is not taking any chances on the price of tires dropping and having to bear the decline. And in doing business as distributors we give our dealers that protection. We couldn't compete against factories unless we did, and we are

supposed to be in the same relative position as a factory branch, giving our country dealers the same protection that a factory branch would give them, and the same terms and prices. That was the conversation that came up when the settlement was made, and we were assured by Mr. Fitzgerald that naturally—to use his own words —naturally if you are going to sell tires to the dealers you must be protected." (Trans. pp. 66-67.)

In answer to the following question:

"Then the tires you kept, state to the jury whether or not you had an agreement with Mr. Fitzgerald that you could go out and sell these to your dealers on spring dating terms, so that in case a price cut came the following spring, your dealers would get the benefit of that price cut, as well as yourself?" (Trans. p. 68.)

Mr. Sherrill answers:

"We had that agreement." (Trans. p. 68.)

On cross-examination Mr. Sherrill testified with reference to the time Mr. Fitzgerald came to Portland in November, 1920, as follows:

"Well, we made a new deal regarding the tires we were to keep . . . Well, the arrangements were that we were to send back a certain number of tires, we were to keep a certain amount on spring dating terms, giving notes for the same with protection of spring dating orders. . . . In fact, the arrangement that we made we were

to return a certain amount of tires and keep a certain amount on, giving the five notes in payment for same with spring dating terms on these five notes." (Trans. pp. 194-5.)

Again he testified:

"We had protection on that order. . . . . On that amount of goods, on those notes. We were protected against decline on those notes—on account of that merchandise." (Trans. p. 197.)

H. A. Auspach, former bookkeeper and general office man of the defendants, testified with reference to the arrangement made in December as follows:

"Q. Do you know of your own knowledge anything about what the understanding was with Mr. Fitzgerald in December when these notes were given and a bunch of tires were returned at the time of this settlement, in reference to the tires that you then had on hand?

"A. The tires that we then had on hand were to be kept in our stock and sold with spring dating terms." (Trans. p. 347.)

He further testified that the substance of what Mr. Fitzgerald told the defendants was that "on this particular stock that we retained we were to have the spring dating protection, and we in turn were to protect our dealers." (Trans. p. 347.)

He further testified:

"It was concluded at that time that we were to return certain stock to San Francisco and sign notes for the balance which we were to retain, and with the spring dating terms." (Trans. p. 348.)

On cross-examination Mr. Auspach testified that Mr. Fitzgerald agreed to give defendants *absolute protection* against decline in prices on the goods retained. (Trans. pp. 379-80.)

Mr. Fitzgerald agreed, "The stock would be protected against decline for spring dating." (Trans. p. 380.) "The agreement was we were to have protection on that stock and go out after the spring dating business." (Trans. p. 381.)

An attempt on cross-examination to limit the guarantee to protection on only the goods sold to dealers called forth the following:

"There was some stock, perhaps, that wouldn't be sold at the time. There was nothing said about any particular part of it being subject to rebate. . . . Well, the spring dating was protection they would have on that stock, on which they would go out after business—protect the dealer." (Trans. p. 382.)

Edgar T. Munnell testified that when Mr. Fitzgerald came from San Francisco in November, defendants had about $35,000 worth of Mohawk tires and tubes on hand. There was some correspondence with reference to the company advising them not to send any tires until

Fitzgerald came up. At that time he agreed to take a certain amount of tires back.

After the shipment, an inventory was taken on December 31, 1920, showing they had between $26,000 and $27,000 worth of tires on hand. (Trans. p. 405.)

A. J. Munnell testified as to the agreement made with Fitzgerald as follows:

"On this visit of Mr. Fitzgerald in November, 1920, he came up here to try to settle this matter of our overstock in tires, and taking care of the account. We had more tires than we knew what to do with, and wanted them to take them back. They evidently didn't want to take them at San Francisco, and didn't have any other place to take them, so they sent Mr. Fitzgerald up here, and we talked it over and he agreed to take a certain number of the tires on hand, at San Francisco. We were to give notes for what we owed him, after this credit memorandum was issued; we were to have protection on the stock we kept, regardless of when it was purchased. We were to go—we were still to go out after Spring dating orders, and consider this just as though it had been purchased for Spring dating orders. In other words on whatever terms they could go after Spring dating orders, we could go after them with this stock. That meant in case of decline, if the government ruling permitted a guaranty against decline, we were to get it." (Trans. pp. 409-410.)

Mr. Munnell testified that it was understood that the

agreement was subject to government ruling the same as such ruling might affect the Goodyear and Goodrich people or anybody else. (Trans. p. 430.)

Asked on cross-examination if the arrangement was that indicated in the letters of October 19th and 30th, (Exhibit X, Trans. p. 160, Exhibit AA, p. 169), Mr. Munnell testified:

> "I am not referring to any letter at all. I am referring to verbal agreement we had with Mr. Fitzgerald, which was to the effect that if we kept the rest of this stock that we didn't turn back to San Francisco in 1920, that stock would be put in position for us to go out and sell just as though we had ordered from factory on Spring dating terms, and protect our dealer in case of decline, in case it was in his hands." (Trans. pp. 430-431.)

Asked if Fitzgerald could go further than the arrangement outlined in the letters of October 19th and 30th, the witness testified:

> "That I don't know. We had no way of knowing. He came here and offered wire from the factory showing they told him to let us return some tires and take notes for the balance. We didn't know what his instructions were here. He might have had full instructions, and probably did have full instructions, we took it for granted that he did." (Trans. p. 431.)

In connection with this answer, we call attention to Exhibit 1, (Trans. p. 57), which Fitzgerald showed the

defendants and left with them. The court should note that plaintiff failed to produce Fitzgerald's letter to the home office of November 19th referred to in the telegram. The court should also note in this telegram the words: "Have *all tires* returned San Francisco branch." (Trans. p. 57.)

This wire would clearly indicate that Fitzgerald had the authority to do what the defendants desired, namely, to permit them to return their tires to San Francisco so as to wipe out the indebtedness. It corroborates the claim of defendants that Fitzgerald had authority to make the agreement with them, that instead of returning all of the tires to the San Francisco branch they should return about $6,000.00 worth, get notes for the balance and make a new deal by having price protection.

The inventory of goods on hand December 31, 1917, was about $27,000. When the decline took place in May there was something like $20,000 or $22,000. Some goods had been purchased in the meantime. (Trans. p. 433.)

> "Q. You want the court and jury to understand that Fitzgerald went further and said that you could have a rebate irrespective of when the merchandise had been purchased?
>
> "A. This is what I want them to believe. Yes, sir." (Trans. p. 434.)
>
> "Q. You claim that Fitzgerald agreed that you could have—agreed in December, 1920, some nine months later, that you could have a rebate on

that merchandise, if it were declared in the future?

"A. That was his agreement, yes." (Trans. p. 435.)

Asked if they got an agreement in writing to this effect, witness stated that they did not. They did not have any idea whether there was going to be a price decline or not. (Trans. p. 436.) (Later Fitzgerald denied making the agreement. (Trans. p. 474.) Fitzgerald said nothing about submitting the proposition to the factory for rebates. (Trans. p. 438.)

Munnell further testified:

"We talked to Mr. Fitzgerald pretty plainly about keeping these, and asked him to tell us how we could compete with other manufacturers if we kept that stock and didn't have protection; we were a distributor and practically in the same position as a factory branch, and that stock had to be—if we were going out to sell Spring dating, we had to be on the same basis as any other manufacturer or his branch in Portland, and he agreed to that." (Trans. p. 438.)

Mr. Fitzgerald, in rebuttal upon the witness stand, with reference to this agreement at the time the notes were executed, testified as follows:

"Q. Now did you say anything to them at that time about your authority to give them any agreement of that sort?

> "A. I don't remember whether I did or not, but nevertheless Munnell & Sherrill understood just how far my authority extended, and even though I had agreed to give them price protection, they knew that I would have to first take it up with the factory."

It is very clear from the testimony of Fitzgerald on pages 474 and 475 of the transcript, which has just been quoted, that defendants understood, and had a right to understand at the time the settlement was made, that they were to be given protection. On page 474 it is very clear that Mr. Fitzgerald's answer took it for granted that they would be allowed this protection as a matter of course, for he testified as follows:

> "Well, when getting back to these notes, when Munnell & Sherrill presented us with these notes this price protection proposition was gone into, and I told them I would take this matter up with the factory, and *presumed that in all probability they would be given price protection, but nothing ever came of it.*" (Trans. p. 479.)

It is very easy when matters are done orally to forget some words in a conversation, but we submit that the testimony of the Pacific Coast Manager, in spite of his attempt to disclaim final authority, clearly corroborates the testimony of plaintiff that there was an absolute agreement as to price protection on the goods kept by them when the settlement was made about December 2, 1920. In addition to this oral testimony, there are two letters which the plaintiff wrote the defendants which,

we submit, clearly show that Fitzgerald did take the matter up with his company and his presumption that in all probability they would be given price protection, (Trans. p. 479), was actually carried into effect by the company (though the company later attempts to repudiate this agreement) in their letter of May 10th, (Exhibit 3, Trans. p. 70), from the company's Akron office to the defendants. The new list giving the new price decline was enclosed, and in this letter we find the following:

> "Prices will be adjusted back to May 2, and price guarantee will cover goods on hand and unsold, bought during March and April, *also unsold portion of dating orders.*"

It also stated that the discount would be 25-15 off consumer's list, subject to the usual cash discount and tax added, (Exhibit 3, Trans. p. 71) being the list of May 10, 1921, and further stating:

> "Goods bought on dating and which are on hand and unsold on May 2nd may be included." (Not price protection.) (Trans. p. 72.)

Under this situation of the record, we find that the plaintiff in the Spring of 1921 has paid all notes outstanding which it executed on December 2nd, except three of the notes which are the subject matter of plaintiff's action.

Discharge of Note in Plaintiff's Third Cause of Action—When the price reduction was announced on

May 10th, defendants immediately undertook to get the credits therefor, pursuant to the agreement which they claim they made with Fitzgerald, and we now have presented the question whether the promissory note dated December 2, 1920, in the sum of $2633.37, and mentioned in plaintiff's third cause of action, was satisfied by the agreement made and entered into between the plaintiff and the defendant pursuant to this understanding at the time the notes were executed, which agreement is pleaded in the third and separate answer of defendants to the third cause of action, as shown in paragraphs 1 to 8, inclusive, of pages 20 to 23 of the transcript. This defense is to the effect that pursuant to this agreement as to price protection that when the decline of May 10th, 1921, was announced, which the plaintiff received about May 12, 1921, that it was subsequently agreed that the note referred to in the third cause of action of plaintiff's complaint should be deemed as fully paid, satisfied and discharged. All of the correspondence which took place prior to December 2, 1920, hereinabove referred to, and the agreement which the defendants claim was made at the time the notes were executed, constitute the preliminary stages of the agreement which we claim was finally entered into for the discharge of the third promissory note as set forth in the further and separate answer to plaintiff's third cause of action.

Testimony of *A. J. Sherrill*—When tires declined May 10, 1921, defendants sent a list to plaintiff of tires on hand (Trans. p. 76), defendants' Exhibit 4, (Trans. p. 77), the letter was signed by their bookkeeper. (Trans.

p. 226.) Fitzgerald acknowledged receipt of this letter and list by letter of June 2, Exhibit 5. (Trans. pp. 81, 228.) Defendants answered this letter, Exhibit 5, by letter of June 4th, (Trans. p. 83) in which defendant said:

> "The only agreement we know anything of is the one we made with you when we signed the notes last fall, and it was to the effect that we were to be protected against decline."

Fitzgerald came to Portland on or about June 13, 1921, (Trans. pp 85, 276, Exhibit 35, p. 313), and defendants had a conversation with him in their office, with Auspach present. (Trans. pp. 84, 278.) Mr. Sherrill relates the conversation with Fitzgerald as follows:

> "Mr. Fitzgerald came up to Portland and we talked over different things, and finally discussed the proposition of our rebate, and finally he said, well, he said, 'The matter is in such a condition here,' he says, 'that it is going to be awfully hard to take this stock and figure out just exactly what your correct rebate would be.' He says, 'The tires have been purchased at different times and there was a fall dating'—the notes we gave him in the fall with the Spring dating order, and the tires that we had purchased since then, and he felt that it would be a pretty hard question to figure out the actual amount that we were entitled to on rebate, and he also felt that we were not entitled to a rebate on our entire stock, and we agreed with him on that, that possibly it would be better to make a sort of compromise. So he suggested that inas-

> much as there were five notes, that we would consider one of these notes as the amount of the rebate and stated that he would go to San Francisco and issue us credit for that amount." (Trans. p. 86.)

On cross-examination Mr. Sherrill stated.

> "Well, Mr. Fitzgerald said that the condition of the stock was such that it would be pretty hard to get at the matter any other way, and he thought our list as sent him was too large; that one of these notes would be a reasonable rebate." (Trans. p. 279.)

On a subsequent visit to Portland, the matter again came up, and Mr. Sherrill testified:

> "At that particular time there was no mention made of any particular note, but at a subsequent visit to Portland Mr. Fitzgerald told us to hold the last note. We had taken the matter up with him as to credits which had not come through. After he had returned to San Francisco we didn't get our credits for these—credit for this amount, so when we took it up with him the second time when he came to Portland, which was possibly a month later, Mr. Fitzgerald said, 'Well, just pay — just hold out the last note. When you have come to the last note, why just hold that out, that will take care of the rebate.'" (Trans. p. 88.)

Again he testified that Mr. Fitzgerald told them, "That we were to take the last note; to pay the four

notes and take the last note as our rebate." (Trans. pp. 88-89.)

Sherrill was asked on cross-examination if he wrote the company to return the note, and he stated that he wrote to San Francisco.

See Exhibit 11, (Trans. p. 284), wherein defendants write:

> "Seems as though we should have our credit for price decline which took place over ninety days ago. Have looked for it on our statements for July and August, but to date it has not appeared. Wish you would ask the factory to put this through, and greatly oblige."

Testimony of *H. A. Auspach*—This witness, after the May 10th decline, sent a list of tires in stock May 14, 1921. (Exhibit 42, Trans. p. 336.) Mr. Fitzgerald came to Portland in June, 1921, and had a conversation with defendants with reference to rebates on tires by reason of the cut of May 10, 1921. (Trans. p. 345.) Mr. Fitzgerald stated:

> "He said that he thought we were asking a little too much for rebate on account of that decline, and Mr. Munnell replied that he—that we were entitled to it, but he wanted to be fair in the matter; as far as I recall; and Mr. Fitzgerald suggested that the rebate be the amount of one of these notes." (Trans. p. 346.)

Later, namely on August 15th, defendants wrote to

Fitzgerald with reference to the rebate. (Exhibit 11, Trans. p. 349.)

On cross-examination Mr. Auspach testified that the matter of credit on the stock on hand came up in the conversation in June. (Trans. p. 383.) Mr. Fitzgerald seemed to think defendants were asking an awful lot and he suggested the matter of one note. (Trans. p. 384.)

In reference to the letter of May 10th, sending a new list constituting a decline, (Exhibit 3, Trans. pp. 70-74), Mr. Auspach testified:

> "That form letter they sent out—in fact I disregarded as Mr. Fitzgerald had made arrangements previously to have this entire stock on Spring dating terms." (Trans. p. 384.)

Defendants were entitled under the arrangement made in December to rebate on all stock on hand at that time and entitled to rebate on purchases made in March and April, 1921. (Trans. p. 385-6.)

Defendants had made a list of everything in stock on May 14th and Mr. Fitzgerald was kicking about that. (Trans. p. 387.) Fitzgerald said nothing that it was out of his jurisdiction to consent to the cancellation of the notes, or that he would have to refer it to the factory. (Trans. p. 388.)

Testimony of *Edgar T. Munnell.*—Tires declined in May, 1921. (Trans. p. 411.) Fitzgerald arrived in June, 1921. Defendants had a conversation with him. Pre-

vious to his visit they had sent a list of tires and serial numbers, the list including the tires sold to dealers on Spring dating orders. (Trans. p. 411.) Mr. Munnell related the conversation as follows:

> "Well, he said that the list we had sent down to them was a little bit stiff, and it looked like everything we had on hand. If I remember rightly, he said it looked as though it was all the tires we had on hand when he was here in November. I said it isn't, it is the tires we had on hand on May 14, 1921, and the tires that we sold to dealers upon which we had to give protection. Well, he says it looks pretty stiff. I says yes, but we want to be fair in the matter. What have you to suggest? Well, he says, I haven't figured this exactly, but it would look to me as though this rebate on this list that you sent us amounted to over $4000. I said, I think possibly it would, between $4000 and $5000. He says, 'Suppose I give you credit for one of these notes to apply on that, to take care of this rebate. Would that be satisfactory?' Well, I said, I think it would. I said it would be with me; I says, 'Of course, Mr. Sherrill has got to be considered in this, but I will take it up with him.' Now whether Mr. Sherrill was in the office at that time or had come in, I can't say. It wasn't—it was a very short time afterwards, either the same day or the next day, that we agreed on this, the amount of one of those notes taking credit on that rebate. Understand, that at no time when Mr. Fitzgerald was here in June did he go over our stock and take an inventory of it to see how many of these tires we were entitled to rebate on, or not." (Trans. pp.

412-413.)

Fitzgerald later made a visit in July or August, or it may have been in September, at least, it was afterwards. At that time he told us to hold out one of the notes and not pay it. This is the third time they took the matter up and that is what he stated, and under this arrangement they are claiming satisfaction and discharge of that note in settlement of the rebate made on May 10, 1921. (The note is the one referred to in plaintiff's third cause of action.) (Trans. p. 414.)

The list of tires in stock on May 14, 1921, (Exh. 4, Trans. p. 77), was prepared pursuant to Mr. Munnell's direction and forwarded to plaintiff in 'Frisco. (Trans. p. 438.) The letter that accompanied the list is Exhibit 4. (Trans. p. 439.)

The foregoing testimony in the light of the transactions occurring previous to December 2, 1920, constitutes defendants' case consisting of a discharge of the notes set forth in plaintiff's third cause of action, and as pleaded in defendants' further and separate answer thereto, (Trans. pp. 20-23), and we respectfully submit that it was sufficient to take the question to the jury whether the note is discharged.

In the matter of this note Fitzgerald's testimony, though it does not agree with that of defendants, contains some interesting statements. Prior to his coming up in June, he did receive a list of tires on which defendants claimed a rebate by reason of the decline in prices announced May 10, 1921. (Trans. p. 478.)

Testimony of *W. G. Fitzgerald*—We have heretofore referred to the fact that Fitzgerald testified at the time the notes were given that the price protection proposition was gone into, and he told the defendants he would take the matter up with the factory, and *presumed that in all probability they* would be given price protection. (Trans. p. 479.) He states that nothing came of it, however. It is clear from this that the defendants were undoubtedly led to believe that they would be given this price protection when they gave the notes, otherwise they would have shipped all the tires to 'Frisco. For Fitzgerald's telegram from his home office directed *"all tires"* to be returned to San Francisco. (Exh. 1, Trans. p. 57.) So in reference to the conversation in June as to the rebate by reason of the May 10th decline, Mr. Fitzgerald testified:

> "Well, I remarked to these gentlemen that if we were to give them a rebate covering every tire that was on that list, that it would probably amount to $3500 to $4000, and they agreed that it would, and whether or not I remarked myself that if I got them a rebate it wouldn't exceed one of these notes, or whether Mr. Munnell or Sherrill suggested that one of these notes be turned back to take care of a rebate, I don't know, but, however, I did take that matter up with the factory, and suggested that." (Trans. pp. 479-480.)

It is very clear from this testimony that Fitzgerald, the Pacific Coast Manager, himself considers that they were entitled to the rebate, though he claims that he had

no authority to grant the rebate, but that it had to be done by the factory. (Trans. p. 481.)

After the conference in June, upon glancing at the list he surmised that it would amount to between $3500 and $4000. He stated that if they were able to get a rebate on the tires he would think it would amount to about the equivalent of the note. (Trans. p. 479.) He did not tell them they were not entitled to a rebate. He stated he thought it would amount to about the equivalent of the note. (Trans. p. 498.) He said that there were no definite promises to them that they would get a rebate.

> "Q. It was just general assumption that they would get it?
>
> "Ans. On their part, yes.
>
> "Q. And on your part?
>
> "Ans. *Not altogether.*" (Trans. p. 498.)

On cross-examination he was asked if he, Fitzgerald, did not suggest that they should hold out one of the notes until they should get the rebate they were entitled to, and he answered, "I did." (Trans. p. 499.) He then tried to qualify his admission by stating that they were entitled to a rebate "to the extent of about $500.00, I think." (Trans. p. 500.) Yet his previous admission shows that until he attempted to hedge on the witness stand he had previously stated to them that he considered they were entitled to the rebate amounting to the $2633 and some cents.

On cross-examination he further testified that he had given full price protection to the extent of the decline to the Tire Service House of Seattle, (Trans. p. 503), and to the Knott Atwater Co. at Spokane, (Trans. p. 505), though he claims that was on certain special orders only.

Defendants tried to show on re-cross-examination that the plaintiff repudiated that agreement made to the firm in Seattle, but the court would not permit evidence to be introduced as to the matter. (Trans. p. 516.)

We submit that under the foregoing evidence it was clearly the duty of the court to submit to the jury the question whether the defendants' defense to plaintiff's third cause of action was made out.

The question of authority will be hereafter analyzed.

QUESTION OF CREDIT OF $249.44

We will now examine the testimony as to the claim of defendants that they were entitled to a credit in the sum of $249.44 by reason of a decline announced by the plaintiff November 15, 1921, for which decline plaintiff allowed them only the sum of $111.68.

Plaintiff offered in evidence Exhibit JJJ, showing the purchases made by the defendants from the plaintiff. (Trans. p. 468.) Defendants offered in evidence Exhibit 44, which was a credit in the sum of $111.63 issued to defendants on December 28, 1921, by reason of the November 15, 1921, decline. (Trans. p. 356.) Exhibit 43 is a letter sent by defendants to plaintiff on Novem-

ber 21, 1921, showing the amount of tires and tubes received *since* September 15, 1921, and which were on hand at the time of the decline in price November 15th, and subject to rebate, (Trans. p. 355), which new price list which is referred to herein and in the testimony as the decline of November 15, 1921, is Exhibit 45. (Trans. pp. 368-371.) This list gives the rebate on goods bought since September 15th, and on hand unsold November 15th. The list under which defendants purchased goods between September 15th to November 15th, 1921, is the list of May 10th, 1921. (Exhibit 3, Trans. pp. 73-74.) In other words, the tires and tubes listed in Exhibit 43, (Trans. p. 355), were purchased according to the list of May 10, 1921. Exhibit 3, pp. 73-74.) The price was cut by the list announced November 15, 1921. (Exhibit 45, pp. 369-371.) It is a mere matter of compilation to ascertain whether the goods bought between September 15th and November 15th, and shown in Exhibit 43, (Trans. p. 355), and which were paid for under list Exhibit 3, (Trans. p. 73), amounts to the sum of $111.68 according to the credit issued, (Exhibit 44, p. 356), or the sum of $249.44 claimed by the defendants.

We submit herewith a compilation as we work it out from the testimony showing that $249.44 is the correct amount.

Mohawk Credit Memo. No. 429, of December 28th, 1923, as it should be, using the May 10th, 1921, and November 15th, 1921, lists and prevailing discounts:

		May 10th List	Nov. 15th List	Dif. in Lists	Disc.	Net Dif. in Cost	Total
5—30x3½	N. S. Fabs.	$21.00	$17.00	$ 4.00	25-15%	$ 2.55	$12.75
2—31x3½	N. S. Fabs.	23.00	19.00	4.00	25-15%	2.55	5.10
2—34x3½	N. S. Fabs.	28.00	24.00	4.00	25-15%	2.55	5.10
2—33x4	N. S. Fabs.	34.50	30.00	4.50	25-15%	2.87	5.74
1—37x4½	N. S. Fab.	49.00	44.00	5.00	25-15%	3.19	3.19
2—35x4	N. S. Fabs.	38.00	32.50	5.50	25-15%	3.50	7.00
5—33x4	N. S. Cords	52.50	35.15	17.35	25-15%	11.06	55.30
5—34x4	N. S. Cords	53.50	36.10	17.40	25-15%	11.09	55.45
1—33x4½	Rib Cord	57.50	44.05	13.45	25-15%	8.58	8.58
3—33x4½	N. S. Cords	59.00	45.20	13.80	25-15%	8.80	26.40
4—34x5	N. S. Cords	73.00	56.50	16.50	25-15%	10.52	42.08
4—28x3	Red Tubes	2.50	2.20	.30	25-15%	.17	.68
4—35x4	Red Tubes	4.85	4.25	.60	25-15%	.38	1.52
1—31x3½	Red Tube	3.55	3.00	.55	25-15%	.35	.35
5—31x4	Red Tubes	4.20	3.50	.70	25-15%	.44	2.20
5—33x4	Red Tubes	4.50	3.85	.65	25-15%	.42	2.10
6—37x5	Red Tubes	7.35	6.30	1.05	25-15%	.67	4.02

$237.56

5% Excise Tax 11.88

Total $249.44

The testimony in reference to this matter is as follows:

As shown by Exhibit 44, (Trans. p. 356), the credit of $111.68 by reason of the November 15, 1921, decline, was issued December 28, 1921. On January 23rd, (Exhibit 13, Trans. p. 287), defendants write to plaintiff notifying them that the credit sent for rebate covering

tires on hand November 15th, and purchased within the past sixty days, was not in line as they could readily see by glancing at it, notifying them of the return of the credit for correction, and trusting that they will figure it correctly so that their records will agree with the defendants' records.

Testimony of *H. A. Auspach,* in reference to the credit of $249.44. Defendants received a credit memorandum with reference to the disputed item of rebate of $249.44, (Trans. p. 350), referring to Exhibit 44 subsequently introduced, (Trans. p. 356). Plaintiff did not give defendants credit for the $249.44. Credit issued is dated December 28, 1921. (Trans. p. 351). New price list on November 15th, 1921. (Trans. p. 351.) Based upon the same price decline list, (Exhibit 45, Trans. p. 369), the real credit defendants are entitled to is the difference of the old cost and the new cost on each tire.

On page 353 of the transcript the witness refers to having *lost* the list sent by the plaintiff to defendants; the list is subsequently found and produced and is offered in evidence as Exhibit 45, (Trans. p. 369), and based upon the two lists and the tires as shown on Exhibit 43, the difference, as the witness figures it, is $249.-44. (Trans. p. 355.)

Witness *personally* mailed to plaintiff, letter of November 21st, Exhibit 43, (Trans. p. 355), containing a list of the tires and tubes received since September 15th,

and on hand November 15th, 1921, and plaintiff issued a credit only of $111.68, Exhibit 44. (Trans. p. 356.)

In figuring the amount of credit which the Mohawk Rubber Company should give defendants, on cross-examination he testified that (Exhibit 43) the list sent to the plaintiff by the defendant is a correct list. (Trans. p. 372.) There is no dispute as to the *number of tires* on which they are to be allowed a credit, the only dispute being as to the *amount* of the credit. (Trans. p. 373.) In order to figure the amount due, witness takes the list of November 15, figures the 25 and 15% off, giving defendants' cost of the tires, and deducting the amount from the original cost, as shown by Exhibit 3, (Trans. pp. 73, 373.)

When plaintiff sent the credit memorandum, Exhibit 44, defendants wrote them about it. (Trans. p. 375.) The tires given in the list, Exhibit 43, were bought within 60 days of the date of decline. (Trans. p. 375.) Witness explains method of computation by defendants. (Trans. p. 376.) Computation *above set forth* (p. 62 of this Brief), covers the credit according to defendants' contention.

Conclusion—We submit that this matter was a proper matter to be submitted to the jury, and, furthermore, that a computation made by the court will verify the contention of defendants that they were entitled to a credit of $249.44.

CREDIT FOR TIRES DELIVERED TO AMERICAN TIRE & RUBBER CO.

There remains to be considered the amount of credit which defendants are entitled to by reason of the tires turned over to the American Tire & Rubber Company, which transaction we will hereafter, for the sake of brevity, refer to as the Cassidy deal.

Defendants allege that in September, 1921, the plaintiff entered into negotiations with the American Tire & Rubber Co. to handle its line of tires in the District of Oregon, though the defendants herein have exclusive agency for said district; that the defendants consented to such change of agency by the plaintiff, provided the Mohawk tires held in stock by the said defendants would be turned over to this plaintiff or its agent and these defendants be credited with the amounts represented by these tires so turned over; that the said plaintiff by and through its duly authorized agent has consented to such arrangement, these defendants to deliver to the American Tire & Rubber Co. with the consent and at the request of the Mohawk Rubber Co. a large quantity of tires then held in stock by them, which were of the agreed value of $9,814.20. (Trans. pp. 15-16, par. VII, VIII and IX; trans. p. 19, par. VII, VIII, and IX; trans. p. 26, par. VII, VIII, and IX.) For the tires turned over by the defendants on the Cassidy deal, plaintiff issued a credit memorandum for $1,079.25, (Exhibit 8, p. 98), instead of issuing to defendants a credit memorandum for $9,814.20, which de-

fendants claim is the amount of the credit due it for the tires turned over on the Cassidy deal. The testimony in reference to this matter is in substance as follows:

Testimony of A. J. Sherrill—Mr. Fitzgerald called on the defendants about the first or second week in September, 1921. Defendants had not been getting along very well with the Mohawk line, they were not selling any large truck tires. (Trans. p. 90.) Mr. Fitzgerald asked Mr. Sherrill about letting Cassidy sell pneumatic truck tires, which was the large size defendants were not selling. Mr. Sherrill told him that he did not believe they could get Cassidy as he was tied up with the general factory, and Fitzgerald told him that he had had an interview with Cassidy in San Francisco. He felt he could get Cassidy as a distributor, and Fitzgerald suggested that, or agreed we would allow him to do that if he would take the stock off our hands. Defendants had exclusive rights in the territory, and if they did not stand in his way he would relieve defendants of the stock, and while there was no amount of stock specified, the agreement called for any stock that defendants might give to Cassidy, and defendants later delivered to Cassidy the stock that they considered was the amount of their indebtedness. (Trans. p. 91.) Mr. Fitzgerald asked Sherrill what Munnell would say about changing the line, and he told him to ask him. Mr. Munnell came in, and Mr. Fitzgerald said: "Ed, if I take your stock off your hands, can I transfer the account to Cassidy or the American Tire & Rubber Co?" and Ed said: "Yes, if you relieve us of our stock you can do that." They had

an understanding with Fitzgerald that they could transfer the Mohawk line to Cassidy in consideration of taking the defendants' stock off their hands. (Trans. p. 92.) The conversation is repeated in cross-examination, (Trans. p. 234), and defendants agreed that plaintiff could secure Cassidy to take over their line provided plaintiff would relieve defendants of their stock. (Trans. p. 235). Mr. Fitzgerald asked Munnell what he thought about it, and Mr. Munnell said he was agreeable, provided he took the stock. Fitzgerald said that he would see Cassidy and see what could be done. He thought he could line him up. (Trans. p. 237.) The conversation took place about a week before September 18, 1921. (Trans. p. 233.) Asked on cross-examination if Fitzgerald told him that the factory had become dissatisfied with the condition of their account, Sherrill said: "He did not." (Trans. p. 238.) Asked if Fitzgerald told him that the plaintiff had to sever relations with defendants' firm, Mr. Sherrill testified: "No. Fitzgerald never told us that . . . . never at any time." (Trans. p. 239.)

We wish to call the attention of the court that the testimony of Fitzgerald *contains no such intimation.*

Mr. Fitzgerald then went to Seattle and later returned to Portland, and about a week after the first conversation, namely on September 17th, they had another conversation with him at defendant's place of business with Munnell and Auspach present. (Trans. p. 240.)

Fitzgerald said he was going to be able to get Cas-

sidy to handle the entire line. (Trans. p. 241.) Thereupon, Sherrill and Fitzgerald took stock. They both went out into the store and took the number of tires they had on hand. (Trans. p. 241.) Some of the tires were in racks on the first floor and some piled on the second floor. A record was made of that stock taking. The inventory was taken down on small pieces of paper and afterwards placed on a piece of paper. (Trans. p. 243.) The paper is in Mr. Fitzgerald's handwriting. The stock taking was at the place of business at First and Ash. The writing upon the paper in ink is in Fitzgerald's handwriting. The lead pencil notations thereafter are in the handwriting of some one in the office. (Trans. p: 243.)

The inventory referred to was subsequently offered in evidence as Exhibit 40. (Trans. p. 323.) It is referred to in the testimony as being on yellow sheets, (Trans. p. 388), and is referred to in the testimony of Fitzgerald as pink sheets, and is admitted by Mr. Fitzgerald to be in his handwriting. (Trans. p. 514.)

After they took stock, Fitzgerald stated he would give defendants a letter of authority for turning the stock over to Cassidy. "As soon as he gave us that we were to allow Cassidy to send down and get the stock." (Trans. p. 244.) At the first interview, it was stated if Fitzgerald got Cassidy, he would take defendants' stock off their hands and turn it over to Cassidy. (Trans. p. 245.) At the second interview he said he had made arrangements with Cassidy as to taking over the line and

taking the defendants' stock. (Trans. p. 246.) Fitzgerald said as soon as final arrangements could be made he would give us this letter authorizing us turning this stock over to Mr. Cassidy. (Trans. p. 247.) Defendants had an interview with Cassidy and Fitzgerald on Sunday, September 17th, at Cassidy's place of business. (Trans. p. 247.) Fitzgerald was endeavoring to arrange with Cassidy to have defendants draw tires from Cassidy and continue to sell Mohawk tires in the city. (Trans. p. 248.) This was another reason why defendants did not deliver all the stock to Cassidy as they could have done.

The list made by Fitzgerald (Exhibit 40), (Trans. p. 325), was submitted, and Cassidy and Fitzgerald were checking it over, and Cassidy informed defendants that he was just ordering or had ordered a carload of tires from the Mohawk, and that they were getting out a new flat tread tire. The list was shown and there was a number of bad sizes in there. (Trans. p. 248.) Mr. Cassidy remarked about certain sizes, and *Mr. Fitzgerald said that that would be all right, to go ahead and take whatever* defendants sent him, and if he did not sell them, at a later date he could send them to San Francisco, that he would give him other tires in exchange. Witness is positive as to this statement by Fitzgerald. (This is absolutely corroborated by Cassidy, who was called as plaintiff's witness, see infra.)

The next thing apparently was the receipt by de-

fendants of a letter of September 18, 1921. (Trans. p. 241. See Exh. 37, p. 93.)

Mr. Sherrill testified that the stock was not balanced very good because of the fact that they had been unable to move their stock and had to take back so much stock from dealers. (Trans. p. 258.)

On the inventory list that Mr. Fitzgerald and Mr. Sherrill made and offered in evidence as defendants' Exhibit 40, (Trans. pp. 322-5), the *writing in ink* is in Mr. Fitzgerald's handwriting. Mr. Sherrill thinks the *pencil writing* is either that of Mr. Munnell or Mr. Auspach. Pencil notations on the list or figures, he thinks, are in the handwriting of Mr. Fitzgerald. (Trans. p. 323.) (Munnell later testifies that the pencil notations are his.)

On re-direct examination Mr. Sherrill testified that it was understood that so far as the tires shown in the Fitzgerald list (Exhibit 40) were concerned, any or all of the tires on that list could be turned over to the American Tire & Rubber Co., and there were no tires on the list which the defendants were directed by either Fitzgerald or Cassidy to keep and not turn over to said American Tire & Rubber Co. (Trans. p. 331.)

On re-cross-examination Mr. Sherrill testified that the interview had with Cassidy at the store on Sunday was the only interview with Cassidy with reference to turning over of the merchandise. (Trans. p. 332.)

Before pursuing this transaction further with reference to the letter authorizing the turning over of the tires in the Cassidy deal and the subsequent developments, we think it advisable to present the other testimony upon this matter up to that time, and will accordingly leave Mr. Sherrill's testimony at the point where the transactions had arrived just prior to the letter of September 18, 1921. (Def. Ex. 7.)

Testimony of H. A. Auspach—Mr. Fitzgerald came up from San Francisco in September. Witness was present. Had a conversation with Munnell and Sherrill, which occurred at the offices at First and Ash streets. Fitzgerald made two trips to the office regarding the change from defendants to Cassidy. The first one was in reference to interesting American Tire & Rubber Company in large sizes, and later, four or five days, or maybe a week, Fitzgerald made a second call. Mr. Fitzgerald said he thought he could interest Mr. Cassidy in the larger sizes of tires; that we were not moving them; that we were not moving many large truck sizes; and Mr. Sherrill says that he didn't think that Fitzgerald could interest Cassidy in the line, because he had the General line of tires—was tied up with them. (Trans. p. 359.) This conversation took place at the first interview. At the second interview, Fitzgerald seemed to think that he could place the entire line with the American Tire & Rubber Company. (Trans. p. 359.) Witness states that it is pretty hard to remember the exact words and gave the conversation in a general way to the best of his recollection as follows:

> "Mr. Fitzgerald wanted to know what we thought of giving up the Mohawk line; that he could place it with Mr. Cassidy; and Mr. Fitzgerald was talking to Mr. Sherrill, as I recall it now, in the front office, and I know he came into the inner office, that is, the larger office, and asked Mr. Munnell what he thought about it." (Trans. p. 360.)

Mr. Sherrill and Mr. Fitzgerald came into the inner office and asked Mr. Munnell, "Whether he would consent to this change in distributorship if the Mohawk Company relieved Munnell & Sherrill Company of their stock of tires." (Trans. p. 360.) Mr. Munnell told him he would agree to it. (Trans. p. 361.)

Fitzgerald and Sherrill then started out of the office to count the tires that were on hand to turn over; witness did not see them counting, as he stayed in the office. (Trans. pp. 361 and 388.)

Witness saw Exhibit 40. Fitzgerald made it up from little slips of paper he made notes on in counting tires, brought them into the office and made the list up. The ink portion of the list is in Fitzgerald's handwriting. He wrote it there at the office. (Trans. p. 362.)

On cross-examination he stated that Fitzgerald and Sherrill went out into the stock room and made the list after they came back. Fitzgerald sat down in the office and wrote the paper. As to the figures in lead pencil, (On Exhibit 40), witness states they are not his figures

but are the figures of Munnell. (We wish to call attention at this time that Exhibit 40 as pleaded in the transcript does not show the pencil notations, and we shall attempt between the time of writing this brief and the hearing of this court to have this original exhibit before the court for inspection.) He thinks the lead pencil figures appearing opposite the items represent the cost of the tires to Munnell & Sherrill at the current price at that time. (Trans. p. 390.) He thinks it is the price at which they were billed out to the Mohawk people after the delivery to Cassidy.

Testimony of E. T. Munnell—For the transaction up to the receipt of the letter authorizing the delivery of the tires (Exhibit 7), Mr. Munnell testified:

> "As I recall it, it was early in September; Mr. Fitzgerald was there and talking with Mr. Sherrill in the front office, and Mr. Auspach and I were working in the back office, probably ten or fifteen feet away. They had been talking for some time, I am not sure how long, might have been half an hour, might have been longer. They came out in the office or else I went to the door, and they called me, and Mr. Fitzgerald said 'What kind of a—how would it seem to you if I would make a deal with the American Tire & Rubber Company to take care of this territory? Mr. Sherrill (Fitzgerald) says if I take the stock off your hand at what it cost you that would be satisfactory—would that be satisfactory to you?' I said yes. I think, if I remember rightly, I made it a little stronger than that, but I said yes. The

next thing was Mr. Fitzgerald said that he thought that would be fair, and thought it could be arranged, and I don't know whether I or Mr. Sherrill said that we would help him. I think it must have been Mr. Sherrill, because he knew Mr. Cassidy much better than I did. I think Mr. Sherrill stated, 'If we can help you we will do it, but I don't think there is any chance.'

"Q. All right, what next occurred after that?

"A. Well, I don't think there was anything happened after that, as far as I am concerned, regarding the deal with Cassidy. If I remember, either I left town or Mr. Fitzgerald left town right—either that day or the next day. I know on the 13th of September I went to Seattle, and was in Seattle when I had a long distance call from the office saying that Mr. Fitzgerald had come back to town, and they were ready to make the deal." (Trans. pp. 415-416.)

Mr. Munnell came back from Seattle Saturday, the 17th, and had a conference in Cassiday's office Sunday, September 18th. Cassidy, Fitzgerald and the defendants were present. (Trans. p. 417.)

Asked to relate the conversation occurring, he testified:

"Well, there was more or less talk about how it could be arranged for us to continue selling Mohawk tires in conjunction with the American Tire & Rubber Company, on what kind of a ba-

> sis, and that was one of the important matters that we took up. The other matter, as I recall it, was the amount of stock that Cassidy would expect to receive from us. Mr. Cassidy had the day before, or previously anyway, or else that day sometime, given Mr. Fitzgerald an order for tires, and when Mr. Sherrill and I got there to go into the matter of how many tires were to be turned over, there were to be certain changes made in that order. Mr. Cassidy sat on one side of the desk, the side he usually sits on, which would be represented by where Mr. Fitzgerald sits now, and I was on this side of the desk with a list, with this orange list of tires in my hand. Mr. Cassidy was checking off the sizes that he was going to buy, and I was showing him the number of tires we had to be turned over to him. . . . This was an approximate list of the tires we had on hand to turn over. We were going to keep a few. The list as originally made out was made out by Mr. Fitzgerald. I added the figures here, to get an idea as to about how much stock we had on hand at that time. . . . I am not certain when, whether it was before they were up to Mr. Cassidy's, or afterwards." (Trans. pp. 418-419.)

(Exhibit 40 which he refers to as the orange list, and which by other witnesses has been referred to as the pink list and yellow list, is the exhibit with the lead pencil notations above referred to, and which should be before the court for inspection.)

He further related the conversation as follows:

"I said, 'Here is an approximate list of the tires we have to turn over.' And we came to two or three sizes here that we were long on, and we had some of them ordered in this order that he had given to Mr. Fitzgerald.

"Q. What occurred in reference to that, what was said?

"A. I said, 'You don't want to order any—here is twenty-three 34x4½ non-skid Cord. You don't want to order any of them, I have twenty-three of them.' He says, 'Let them come along, we can use them.' That might not have been the size, but was a large amount like that, and was a size I thought he shouldn't have ordered so many of because we had this certain number to turn over.

"Q. What was said with reference to your right or your power to turn over that entire list to Cassidy, if desired.

"A. At no time during the talk with Mr. Fitzgerald and the talk with Mr. Cassidy was there anything said about how many we were going to turn over, it was supposed *we could turn over* everything we had." (Trans. pp. 419-420.)

Fitzgerald said, "You better *go as easy as you can* and not send *all* those tires over to Cassidy."

With reference to the Cassidy deal, on cross-examination Mr. Munnell stated:

> "The proposition was that the stock was to be taken off our hands by the Mohawk Rubber Company at what it cost us. . . . . It was understood that it was to be turned over to Cassidy." (Trans. p. 441.)

Fitzgerald was going to deal with Cassidy or the American Tire & Rubber Company. We were agreeable to his giving him all or part of the territory, provided all stock was taken off our hands at what it cost us. (Trans. p. 442.)

DELIVERY OF TIRES

We come now to the letter of September 18th, 1921, and the transactions occurring subsequent thereto.

Testimony of *A. J. Sherrill*—Fitzgerald sent a letter to defendants pursuant to the transactions as we have stated them. The letter was dated September 18, 1921, and is offered in evidence as defendants' Exhibit 37, (Trans. p. 93), and this letter read as follows:

Portland, Oregon, Sept. 18th, 1921.

Munnell and Sherrill,
Portland, Oregon.

Dear Sirs:

"This letter will be your authority to turn over to George H. Cassidy, Prop. of the American Tire and Rubber Co. of your city, *any* Mohawk tires or tubes that you have in stock at present and in *any* quantity or sizes that *might be agreeable to yourselves and the said*

George H. Cassidy, Prop. of the American Tire and Rubber Co.

"Please furnish us with a list showing the serials, styles and types of any tires that you might turn over to the other party, also furnish us with list showing the red and gray tubes that might be transferred to the same party. *Upon receipt of said lists and information, credits for the amount will be issued to apply against your account.*

Yours very truly,
Mohawk Rubber Co., Inc., of N. Y.
By W. G. Fitzgerald,
Pacific Coast Manager."

(Trans. pp. 93-94.)

Let us analyze this letter. The letter gives authority to the defendants to turn over to George H. Cassidy *any* Mohawk tires or tubes that the defendants had in stock at that time, and in *any quantity or sizes* that might be agreeable to the defendants and the said Cassidy. Upon furnishing plaintiff with a list thereof, they agreed to issue credits for the amount to apply against the account of the defendants. The court should notice that this letter does not limit the authority of the defendants to turn over certain Mohawk tires in any limited quantity or any limited size. Under this letter defendants had a right to turn over *any* Mohawk tires, which included *all* they had in stock, *or a portion* that they had in stock, the quantity and size being left to Cassidy and the defendants. Under this letter the defendants turned

over tires amounting to $9,814.20 in value, and the question is, were the quantity and size agreeable to the defendants and the said Cassidy? Defendants furnished to the plaintiff a list of the tires turned over to the American Tire and Rubber Co. Fitzgerald knew the tires that the defendants had on hand, (Trans. p. 94), and he wrote the stock list thereof, (Exh. 40.) The list of tires delivered to Cassidy and sent to plaintiff is defendants' Exhibit 9. (Trans. p. 103.) Fitzgerald *did turn* the Mohawk line over to Cassidy, and the defendants *surrendered their right* to that line. Whether or not they had the right to hold an *exclusive agency,* the fact remains that the defendant had an exclusive agency as distributors of the Mohawk line up to that time. Cassidy *received* the tires; he *sent his truck* for them and *his* truck man signed the shipping receipt. (Trans. p. 95.) The receipt given by the truck man is Exhibit 10. (Trans. p. 109.) Instead of giving defendants credit for the tires turned over amounting to $9.814.20, plaintiff gave defendants credits, (Trans. p. 97), in the sum of $1,079.25. (Exhibit 8, Trans. p. 98.)

Testimony of *H. A. Auspach*—Witness is familiar with the letter of instructions in reference to the Cassidy deal, (Defendants' Exhibit 7), and prepared a list of the tires turned over to Cassidy and mailed that list personally to the plaintiff. (Trans. p. 100.) The list sent was offered as defendants' Exhibit 9. (Trans. p. 103.)

On September 21st defendants notified the plaintiff

by letter (Exhibit 36, Trans. p. 314), that they have transferred practically all of the stock of Mohawk tires to Cassidy's Company.

> "We are sending the numbers to San Francisco, asking that they credit our account for same."

Auspach counted the tires that he turned over to Cassidy's dray man. (Trans. p. 108.) The shipping bill, (Defendants' Exhibit 10), had a statement thereon in writing:

"Received in good order."

This shipping bill and receipt were signed by the agent of Cassidy, but the court, we believe, erroneously, excluded from evidence that statement. Defendants believe it was proper evidence in view of the claim of plaintiff's letters that the tires were not in good condition after they were receipted for as being in good condition, and the evidence shows that Cassidy never made any complaint as to the condition of the tires he received. (In view of the verdict the ruling was harmless.)

Testimony of *A. J. Sherrill* (Resumed)—Munnell and Sherrill did not employ the transfer man or dray man who came for the tires. (Trans. p. 110.) He receipted for the number of tires and no shortage was reported. Mr. Cassidy never made any complaint with reference to the tires. Mr. Fitzgerald went through the list of tires turned over to Cassidy and saw them and

the tires the dray man received were the tires that Fitzgerald saw. Neither Mr. Cassidy nor the American Tire and Rubber Company has offered to return any tires turned over to their drayman. (Trans. p. 111.) Cassidy and the American Tire and Rubber Company never complained about not receiving enough tires, or getting too many, or that there was anything the matter with the quality or anything else. Cassidy never indicated that he did not agree to receive the tires which were turned over to him. The next thing he heard about the matter was a wire from San Francisco. (Exh. BBB, Trans. p. 256.) Defendants retained between $4,000 and $5,000 worth of tires from the stock which they delivered to Cassidy, the stock which Fitzgerald saw. (Trans. p. 112.) None were sent to Cassidy from the upper store, (which Fitzgerald did not see.) (Trans. p. 113.) Fitzgerald did not check out the tires which defendants should deliver to Cassidy. Defendants did not receive any complaint from Cassidy or his company with reference to the tires, the amount received, the quality, the condition or otherwise. (Trans. p. 114.)

The balance due defendants from plaintiff was tendered into court with defendants' answers, amounting to the sum of $387.40.

On cross-examination Mr. Sherrill was asked if, under his authority, it was not up to Cassidy to see what tires he would take, and he answered that if Cassidy wished to reject the tires he had the opportunity when he sent down for the tires, and that Cassidy *was*

told by Fitzgerald to take any tires that we gave him. (Trans. p. 250.) Cassidy 'phoned to defendants to get the tires up and as quickly as they could. He told us to send the tires. (Trans. p. 251.) Before that he had gotten certain sizes he was urgently in need of, and got the balance at the time he sent his truck there for the tires. Cassidy said nothing about the quantity; defendants determined the amount by the amount of their indebtedness to the Mohawk Rubber Co. and kept a representative stock. (Trans. p. 253.)

It should be remembered by the court that when the tires were delivered by the defendants to Cassidy, it was the expectation of all the parties, including the defendants, Fitzgerald and Cassidy, that the defendants would continue to sell Mohawk tires at their retail store in Portland, and, therefore, there was no need for them to deliver to Cassidy more tires than would balance their account; had the defendants understood that they were not to be given credit for the note mentioned in the third cause of action, they *could have delivered* from the tires they retained sufficient stock to have *liquidated that note*. Their conduct shows unmistakably that they understood from Fitzgerald, and believed that the May 10th decline and the subsequent agreement with Fitzgerald had liquidated the note mentioned in the third cause of action, for, otherwise, they would have included a quantity of tires sufficient to liquidate that note with the tires sent to Cassidy. They took the number of tires which would equal the indebtedness and sent them to Cassidy.

The arrangements to deliver tires were not made with Cassidy, they were made with Fitzgerald. Cassidy saw the list showing sizes and style. (Trans. p. 254.) Cassidy sent the tires which defendants delivered to him to San Francisco *after his carload had arrived* from Akron. Cassidy told Sherrill that as soon as his car arrived, or after his car arrived, that he had plenty of new stock and did not want them (tires delivered by defendants) any longer. (Trans. p. 255.) Fitzgerald knew what stock was to be delivered to Cassidy as he took stock himself. Mr. Fitzgerald sent defendants the letter and left town. (Trans. p. 262).

The list of stock of defendants taken by Fitzgerald in handwriting made by Fitzgerald was offered in evidence. (Defendants' Exhibit 40, Trans. p. 323.)

All arrangements were made with Fitzgerald on Saturday and they were to get Cassidy on Sunday to arrange with him regarding the *handling of the line by the defendants through Cassidy in the City of Portland,* that is, buying for defendants' retail store; also to submit a list of the tires showing Cassidy what defendants were going to send up. (Trans. p. 327.)

> "We were to take the list as we had it there, to show Mr. Cassidy what our stock consisted of. We were also to arrange with Mr. Cassidy, if possible to do so, for us to handle the line in the City of Portland, and naturally when we submitted the list to Mr. Cassidy we went over the various sizes, and Mr. Cassidy remarked about

> certain sizes of these tires, and Mr. Fitzgerald says, 'Well,' he says, 'there is a few of these that will be slow to move, but take this stock in here, George, and what you can't sell at a later date return to us at San Francisco, and we will exchange stock for what you return." (Trans. p. 328.)

Two deliveries were made to Cassidy prior to Saturday and Sunday when they got together. (Trans. p. 328-329.)

Fitzgerald told defendants to go ahead and send the tires to Cassidy, such sizes as defendants could give him and as he needed them, and that when the deal was terminated that Fitzgerald would give the defendants a letter of authority and defendants delivered the tires and charged them back to the Mohawk Company, (Trans. p. 329), and this was done pursuant to directions given by Fitzgerald orally.

When the letter of instruction was given (plaintiff's Exhibit 7), defendants considered the deal terminated, and that was their authority to deliver the balance of the stock. (Trans. p. 330.)

Mr. Sherrill was asked what his reason was for not turning over additional tires to Cassidy and stated:

> "Well, there were two reasons, one of them was that we were turning over sufficient tires to pay the amount of our indebtedness to the Mohawk Company. The second reason was that we

> were in the tire business more or less, and we thought we could make arrangements whereby we could continue to sell the Mohawk tires, so that it was our endeavor to keep a representative stock. As near as possible we kept every size and every type of tire that we had in stock. We kept one or two of each size and description." (Trans. p. 331.)

Cassidy 'phoned several times to defendants to get the stock up and as quickly as they could. (Trans. p. 333.)

The Fitzgerald inventory list, (Exh. 40), was not made up from the stock cards in the office. (Trans. p. 334.)

Testimony of *H. A. Auspach*—Exhibit 9, (Trans. p. 103), is a true copy of the letter sent to plaintiff at San Francisco. (Trans. p. 101.)

On page 102 of the transcript attorneys for plaintiff in their statement to the court stated that under the letter of Sepember 18th,

> "The only tires Munnell & Sherrill were authorized to turn over to Cassidy were such as were *agreeable to him.*"

In reference to this construction by the plaintiff of its own letter, we call the court's attention to the testimony of Cassidy to the effect that the tires that were

turned over to him *were agreeable* to him. (Trans. pp. 451, 455.)

When Mr. Auspach was first called to the witness stand he could not remember the exact date when the list (Exhibit 9), which he prepared was sent to San Francisco, but stated it was a short time after Fitzgerald wrote the letter of instructions of September 18th. Subsequently, defendants' Exhibit 41, (Trans. p. 325), was introduced, which was a letter written by Munnell and dictated to Auspach, (See EJM-HAA at the end of the letter, trans. p. 327), and in this letter of October 27th reference is made to the list of tires and serial numbers mailed on *September* 21st. Auspach was shown that letter for the purpose of refreshing his memory, and testified that a list, a copy of Exhibit 9, was sent to plaintiff in September, around September 21st. (Trans. p. 345.) Subsequent to the receipt of Fitzgerald's letter of September 18th, witness made an inventory of stock, took account of the stock that they were going to turn over to Cassidy, checked it himself, and the shipping clerk brought it down the stairs and placed it on the first floor. Witness received one 'phone call from Cassidy, who called several times. (Trans. p. 363.) Asked if any complaint was ever received from the American Tire & Rubber Company as to the amount of tires sent them, the quantity, the condition or the quality, he said: "No complaint whatever." (Trans. p. 364.) Cassidy never told defendants that he did not accept the tires, never intimated that he was not accepting them. Witness figured the cost of the tires for the credit to be allowed under the

letter of September 18th. The cost was based upon the last price list or discount, "Used the list of May 10, 1921." (Exhibit 3, Trans. p. 73.) The amount of the credit is $9,814.00. (Trans. p. 372), (plus 20 cents as elsewhere noted). (Trans. p. 366.) The list of May 10th which they used and for which they claim credit, was *lower* than the price *actually paid* for the tires by defendants. (Trans. p. 367.) The *list used in figuring defendants' claim* for credit is the *same list as the plaintiff used* when it issued the credit on November 29, 1921, in the sum of $1,079.25, (Exhibit 8), defendants themselves figuring the credit upon the same basis, to-wit, the price list of May 10, 1921. (Exhibit 34, trans. p. 368.) The price list of May 10, 1921, with 25 and 15% off is the replacement cost of the tires turned over to Cassidy. (Trans. p. 372.)

On cross-examination Auspach testified:

That he made a list (See Exh. 9) of the tires turned over to Cassidy with the serial numbers and sent it to the plaintiff at 'Frisco. (Trans. p. 390.) Being asked why he did not accompany the list with a statement showing the amount of credit they were asking, he said: "Well, it had never been customary in our office; we always sent them list, they sent us a credit memorandum after figuring it out." Witness answered a 'phone call by Cassidy who wanted to know when the stock of tires were going to be sent out. (Trans. p. 391.) Cassidy asked him when they were going to send the stock. Nothing was said as to the size, or quantity, or anything else.

Witness took the tires off the shelves which he sent to Cassidy and counted them. (Trans. p. 392.) Defendants kept a tire or two of every size, kept a representative stock and sent the rest. Defendants were to keep a certain number of tires, they were likewise to keep a representative stock, and all the rest of the tires were to be pulled out. (Trans. pp. 393-394.) The amount sent out figured the amount of $9,814.00. When the tires were gotten down with the shipping clerk they were counted again. (Trans. p. 394).

The Pihl Transfer Company hauled the tires; they had never done any transfer work for the defendants. (Trans. p. 395.)

The tires delivered to Cassidy were figured on the price list of May 10th. They were turned over on the 21st of September, before the price reduction of November 15th came out. (Trans. 400-401.)

Testimony of *E. T. Munnell.* — The tires were turned over to Cassidy on the 21st of September, but three days before that he had been drawing on the stock. (Trans. pp. 420-421.) Defendants had two or three calls from Cassidy or his office asking when the tires were going to be ready. When they were ready, defendants undoubtedly 'phoned to Cassidy notifying them and a truck came after them. (Trans. p. 421.) It was not the defendants' truck; they did not pay for it; had never done business with that transfer company before. A list of the tires turned over to Cassidy was sent to San Francisco. (Exhibit 9.) (Trans. p. 422.)

The *pencil* notations on Exhibit 9 are in *witness's handwriting.* When he figured the cost to them at the time the transfer was made, September 21st, it was based on the list of May 10th, with 20 and 15% off plus the tax. As a matter of fact, the tires cost more than that, (as they were in part stock which was retained when the notes of December 2, 1920, were executed). (Trans, p. 422.)

The plaintiff gave credit to defendants for part of the tires turned over to Cassidy, and in doing so, "they used the same list and the same method of discount." The net amount of tires turned over to Cassidy was $9,814 and some odd cents, and plaintiff gave them a credit of $1,079.25. Cassidy never expressed any dissatisfaction with the tires turned over to him, made no objection to them; made no complaint or objection with reference to quantity, quality, or condition. (Trans. p. 424.) Nothing was ever said by him showing that he was dissatisfied in any respect with the tires sent to him, or anything in reference to the transaction. (Trans. p. 424-425.)

The replacement cost of the entire tires turned over to Cassidy is $9,814.20. (Trans. p. 425.)

Fitzgerald never stated when he came to Portland and consummated this transaction that he did not have the power or authority to make this deal. (Trans. p. 426.)

We will hereafter consider from the correspondence

between the plaintiff and defendant with reference to this Cassidy deal, the point that Cassidy kept these tires for a while, sold from this stock, and later, when his carload had arrived, or was about to arrive from the East, containing the new flat treads, he shipped the stock received from defendants to the plaintiff at San Francisco. We will discuss the testimony of Cassidy hereafter, but at this point, that the court may have the question clearly in mind, we call attention to the fact that the letter of September 18th written by Fitzgerald gave defendants authority to turn over to Cassidy *any* Mohawk tires or tubes that they had in stock, and in *any* quantity or size agreeable to themselves and Cassidy. (Trans. p. 93.)

Cassidy, called as a witness *by the plaintiff* testified that he did not return the tires to 'Frisco because of any fault he found with the condition, or their salability, but on instructions from Fitzgerald, that the lot of tires he received from Munnell and Sherrill was *satisfactory* to him. (Trans. p. 451.)

On cross-examination he testified: That he *accepted* the tires from defendants which they delivered to him, and made no complaint to them as to quantity, condition or number, that the amount he got *was accepted by him.* (Trans. p. 455.)

With this testimony in mind, we wish to show the court that plaintiff attempts to alter the transaction.

SITUATION AFTER DELIVERY OF TIRES TO CASSIDY

Cassidy, after he had sold about 60 of the tires received from defendants, (Trans. p. 451), shipped the balance to 'Frisco on receipt of his cargo of new flat treads. On delivery of the tires to Cassidy, defendants wrote to the home office of the plaintiff a letter notifying them that:

> "On instructions from Fitzgerald we have transferred *practically all of our stock* of Mohawk tires to the American Tire & Rubber Co. We are sending the numbers to San Francisco, asking that they credit our account for same." (Trans. p. 314.)

Defendants also notified the company that Fitzgerald has under consideration their proposition for continuing the line by selling Mohawk tires in their retail store. This letter is acknowledged from the home office by letter of September 26th (Exhibit 37, trans p. 315), in which they acknowledge receipt of the letter, notifying plaintiff that they had transferred the *greater portion of the stock* to Cassidy pursuant to instructions from Fitzgerald; also that the matter of the continuance of the line in their retail store is a matter to be handled locally by Fitzgerald.

The company at San Francisco, the plaintiff, on October 12th, sends a red hot wire to defendants. (Exhibit BBB, Trans. p. 256.) In this telegram plaintiff at-

tempts to complain of the alleged condition of the tires, and says that the defendants "only had the authority of turning over to Cassidy the stock *he could use and retain.*" (Trans. p. 257.) The court will notice that this telegram is not in accordance with the transaction as it occurred, but seeks *to alter* the transaction. Defendants answered this telegram by another (Exhibit CCC, trans. p. 259), stating that they had returned no tires, but had turned all tires over to the American Tire & Rubber Co. under written instructions from Fitzgerald, and at the same time wrote plaintiff a letter. (Exhibit DDD, trans. p. 260.) In this letter defendants state that a large portion of their stock was turned over to Cassidy on written instructions from Fitzgerald, who knew what Cassidy was going to receive, and that he gave Cassidy the privilege of keeping the tires there at an extra discount, or returning them to the factory, stating that they had just called up Cassidy who verified this. They called attention to the fact that when Fitzgerald returns he will undoubtedly straighten out the matter. (Exhibit DDD is the same Exhibit as 38, trans. p. 319.)

On October 14th plaintiff writes a letter from 'Frisco to defendants. (Exhibit EEE, trans. p. 263.) This letter attempts to *ignore the agreement,* and attempts *to ignore the personal inspection* Fitzgerald had made, and states, "Therefore, the ownership of the stock *reverts* to you," that it is being held at 'Frisco. As a matter of law, how the ownership of this stock could *revert* to the defendants without the ownership prior thereto

having *vested* in *Cassidy,* we do not know. It is a clear statement that the ownership had passed from the defendants to another, in this case to Cassidy, and how ownership could revert without defendants' consent, as a matter of law, we do not know, and we do not believe the plaintiff can enlighten us.

Fitzgerald answers defendants' letter of the 27th, (Exhibit 41, Trans. p. 325), by a letter of November 5th, (Exhibit 39, trans, p. 320), and attempts to state that the matter of giving defendants credit was *contingent* upon Cassidy *retaining* the stock turned over to him, and states that inasmuch as Cassidy had not retained the stock "the stock reverts to your ownership."

Defendants answered this letter by a letter of November 9th, (Exhibit 12, trans. p. 285.) In this letter defendants tried to get plaintiff to see the agreement as it was actually made. The home factory at Akron on November 14th send defendants a letter, (Exhibit GGG, trans. p. 273). In this agreement the plaintiff attempts to rehash some of the *old* financial difficulties. The company attempts to construe the agreement made between plaintiff and defendants through Fitzgerald as follows:

> "The permission which you were given to deliver tires to the American Tire and Rubber Company says very distinctly that the tires were to be delivered in any quantity or sizes that *might be agreeable to yourselves and Mr. Cassidy.* It is our understanding that he did not re-

> quest or *agree to the return* of this lot of tires in question. And it was clearly understood at the time that this was merely permission for him to draw upon your stock for such goods as he might need, and that the permission was largely necessary on account of the matter of credit to him being involved." (Trans. p. 274.)

Sherrill answered this letter of the 14th by defendants' letter of the 18th. (Exhibit FFF, trans. p. 265.)

The court will note there is no intimation here that Fitzgerald did *not have authority* to do what he *had* actually done, and it is clear that the statement of plaintiff *upon the* facts is not correct, and, furthermore, the evidence offered by defendants conclusively establishes that the tires they turned over to Cassidy *were agreeable* to him, and when plaintiff called Cassidy as its witness Cassidy testified that he *did accept* the tires that defendants sent him.

It appeared that plaintiff wrote a letter to defendants on October 24th, but which does not seem to be offered in evidence. On October 27th, in the absence of Sherrill from the city, Munnell answered that letter. (Exhibit 41, trans. p. 325.) This letter calls the plaintiff's attention to portions of the transaction which they seem to ignore in their letter, and also asks for credit for the rebate due by the price decline of May 10, 1921, amounting to $2,633.36, being the amount of the note in the third cause of action, also the credit memorandum for the tires turned over to Cassidy "as per list of

sizes and serial numbers mailed you on September 21st, said credit memorandum to be based at current list less the regular jobbing discount."

On November 29th credit memorandum in the sum of $1,079.25, (Exhibit 8, trans. p. 98), was issued to defendants upon the tires turned over to Cassidy. The receipt of this credit memorandum was acknowledged and the balance demanded by defendants in letter of December 2nd. (Exhibit 16, trans. p. 290.) By letter of December 7th, (Exhibit 15, trans. p. 289), defendants demanded that the balance of the credit memorandum be sent them. This is followed up by letter of December 8th, (Exhibit 14, trans. p. 288). On December 28, 1921, credit memorandum is sent. With reference to the decline of November 15th, this is the claim heretofore referred to as a balance of $249.44 defendants are entitled to. On January 23rd, (Exhibit 13, trans. p. 287), defendants tried to get proper credit by reason of the decline of November 15th.

On February 20th defendants sent plaintiff $522.65 which, together with the sum tendered in the answer, and paid into court constitutes a complete discharge of all indebtedness from the defendants to the plaintiff, and was so found by the verdict of the jury.

REBUTTAL

To rebut the case as made by the defendants, the plaintiff read the deposition of Morris E. Mason with

reference to the question of Fitzgerald's authority, offered the testimony of I. H. Peck, who testified (Trans. p. 466), that he heard Sherrill state that in the pending litigation Fitzgerald would be put in a bad light with the Mohawk factory because he had made special agreements with the defendants which Sherrill said he was satisfied, were not known by the factory; called George K. Cassidy to prove what defendants claimed the real transaction was, and recalled W. G. Fitzgerald.

Testimony of *George K. Cassidy.* — Cassidy, the manager of the American Tire & Rubber Company, being called by the plaintiff, testified in substance as follows:

> "I sent no request to defendants for any specific quantity of tires, sizes or style." (Trans. pp. 447-448.)

Cassidy put all the tires in his store that were sent him by defendants and sold part of them after that. (Trans. p. 448.) The list, amounting to about 356 tires he shipped to the Mohawk Rubber Co. at San Francisco. He received his factory shipment on October 11th. He got passing reports on the factory carload of tires through the railroad company as they came in, and finding the car was getting pretty close to Portland, he shipped to 'Frisco the tires received from defendants. (Trans. p. 449.) Asked to state the condition of the tires when he received them from defendants, he said:

> "Well, they were tires that looked as if they had been handled around quite a bit; wrapped in paper, and the paper had been pulled off of it; about half wrapped up; tires that are handled around pretty much paper comes off of them pretty easy." (Trans. p. 450.)

Asked whether the tires were current sizes and style, he stated:

> "There were lots of tires in there that I didn't have any use for; I did not have any demand for *because I had very little dealers' business.*" (Trans. p. 450.)

Asked if that was the reason he sent the tires to 'Frisco, he said:

> "No, not especially; I was kind of in between the two fellows. *My understanding was these tires were to go to 'Frisco, whatever I had left.*" Trans. p. 450.)

He was asked the following questions by plaintiff and made the following replies:

> "Q. I will repeat it. I want to know whether the reason for returning these tires to San Francisco was because of the *fault* you found with their condition?
>
> "A. *No.*
>
> "Q. Or *Salability?*

"A. *No.*

"Q. Why did you return them to San Francisco?

"A. *My instructions from Mr. Fitzgerald.*

"Q. When did you get those instructions?

"A. Well, in the course of the conversation when I took on the line of tires.

"Q. When did that conversation take place?

"A. Some time previous to September 20th; previous to the time I got the tires over from Munnell & Sherrill.

"Q. Was the lot of tires you received from Munnell & Sherrill *satisfactory to you?*

"A. *Yes, they were.* We sold some sixty out of them before the carload came.

"Q. Aside from the ones you sold, the others —were the rest of them satisfactory to you and acceptable?

"A. No, they weren't. At that time Mohawk was coming out with a new flat tread cord. We wanted the new latest tires. I had just signed up a new contract with Mohawk and I wanted new, fresh goods.

"Q. This conversation you had with Mr. Fitzgerald that you spoke of, was that at the time

that Munnell & Sherrill was there, or was that at some other time?

"A. I don't believe Munnell and Sherrill were there. Between *Fitzgerald and myself personally.*

"Q. As I understand it, then, you sent them back because they were unsalable or not satisfactory or acceptable to you, because—there was a new style of tread being put on the market?

"A. That is one of the main reasons, yes; the other was that *any goods that Munnell & Sherrill shipped* over to the Cassidy Tire—the American Tire & Rubber, which was the name of the company at that time—*I was to accept* — that was my understanding; and whatever I sold out of there the Mohawk Company was to bill me for; and *whatever was left when the carload of new stuff arrived I had the privilege of shipping to 'Frisco, which I done.*

"Q. You say that was your understanding?

"A. Yes.

"Q. Did you have any conversation to that effect with anybody?

"A. Yes, I just told you I had a conversation with Mr. Fitzgerald.

"Q. Was that what he said to you?

"A. *Practically those words, yes.* I have a

number of letters substantiating that in my file." (Trans. pp. 451-2-3.)

Asked if it was the understanding that the stock which he was to take was to be current, salable stock, he said:

> "*No, I don't believe so;* I don't think it was brought up at all." (Trans. p. 453.)

On cross-examination he testified that in checking over the stock that Munnell & Sherrill had, he made the remark that there were some sizes that he absolutely would have no use for at all.

The real reason why the tires he did not use or sell were shipped to 'Frisco was because he was taking over the whole Mohawk line. His understanding was that Munnell & Sherrill were cleaning up and getting out of it. (Trans. p. 454.)

> "Q. And you had an understanding there with Mr. Fitzgerald that the *stuff that Munnell & Sherrill had, whatever they wanted to send over to you, you were to take it?*
>
> "A. Yes, sir.
>
> "Q. *And you were to sell what you could, and what you couldn't sell you were to return to 'Frisco and they would give you credit?*
>
> "A. *Just about word for word what Mr. Fitz-*

gerald told me. If it hadn't been that way I wouldn't have *accepted them.*

"Q. Wouldn't have accepted the agency?

"A. Wouldn't have accepted the tires.

"Q. Well, you did accept. *The tires were accepted by you, weren't they?*

"A. *Yes, sir.*

"Q. You didn't make any complaint to Munnell & Sherrill later with reference to the tires?

"A. *No, sir.*

"Q. Quantity, condition or number?

"A. *No.*

"Q. *The amount you got was accepted by you, wasn't it?*

"A. *Yes, sir.* (Trans. pp. 454-455.)

The carload from the factory came through more quickly than he expected, (Trans. pp. 455-456), and when he received those, the stock went to 'Frisco quicker than it otherwise would. If the factory had been short he would have sold from the stock, which defendants sent to him, for a considerable time. The Mohawk people at that time were coming out with a new tread. He sold 67 tires that he got from defendants. (Trans. p. 456.)

This testimony of *plaintiff's witness* is conclusive

evidence that defendants had full authority to turn over the tires which they did to the American Tire & Rubber Company, and that they should be given a credit based upon the list of May 10, 1920, in the sum of $9,814.20 instead of a credit merely of $1,079.25 which the plaintiff allowed them upon the list. (Exhibit 3.)

Mr. Fitzgerald's version of the Cassidy deal is as follows:

> "Mr. Cassidy, the gentleman who testified here yesterday, was in San Francisco probably thirty days before my trip up here in September, and he dropped into my office and made inquiry regarding the Mohawk line, and told me that if ever we felt so inclined to make a change in our Portland connection, that he would be glad to give our proposition consideration. So I felt quite sure there was a possibility there of placing our line, and when I came up here on that trip in September . . . . .
>
> "Well, I informed Mr. Munnell & Sherrill that there was a possibility of our being able to make a connection with the Cassidy Tire Company, that is particularly to sell them large sizes, which were designated as truck sizes of tires, that is, tires of six, seven and eight inches cross-section, diameter, and I wanted to know if they had any objection to my selling Mr. Cassidy these sizes if I could, and they told me they didn't have any objection, to go to it. So with that I went over to see Mr. Cassidy, and as I remember, he gave me an order for about twenty-five or

thirty of these large sized tires. He says, 'Now, Fitzgerald,' he says, 'When these tires come in here I am going to put in service immediately, and if they are as good as I think they are, then we might come in later on that line.' So I wired to San Francisco to have these tires sent up here immediately, and they came up immediately by boat. I caught the train a day or two after I had gotten this order, and I went to Seattle, and from Seattle to Tacoma, so meantime these tires arrived in Portland, and Mr. Cassidy, after looking them over thought so well of them that he immediately endeavored and did finally get in touch with me over the long distance telephone; he caught me at Tacoma, and he said, 'If you will come back to Portland immediately,' he says, 'we are willing to take on the whole line. I like your merchandise, it looks good.' So I came back to Portland a day or two afterwards, and this final settlement was negotiated.

"Q. When you came back to Portland you had an interview with Cassidy, and ascertained through him that he would take on the entire line?

"A. I did. . . . .

"Q. Well, during my conversation with Mr. Cassidy, before I went over to see Munnell & Sherrill—Munnell & Sherrill at that time were operating a retail store in conjunction with—that is separately from their wholesale establishment. Mr. Cassidy thought it would be an awfully good idea if we could retain Munnell & Sher-

rill as local distributors, so with that idea in mind I went down to see Munnell & Sherrill and told them of my conversation with Mr. Cassidy, and I suggested his proposal, and it was agreeable to them. So to find out just what stock Munnell & Sherrill did have, *Sherrill and myself took stock, or took his stock, and I am under the impression that we only took, that is physically, about half of the stock, and that was on the lower floor.* The rest of the stock, I think on the records that were contained on these sheets that he had with him yesterday, came from their card records, but on that point *I am not positive,* it might have been possible that we took the entire stock physically.

. . . . .

"A. Yes. Now Munnell & Sherrill in their records, that is, the records we were looking over here yesterday, there were a lot of goods in there that were salable, and there were a lot of goods that were not salable, that is, at current prices, unless you wanted to go out and sacrifice them. So the following morning after that stock was taken Mr. Munnell and Mr. Sherrill, Mr. Cassidy and myself held a conference in Mr. Cassidy's office." (Trans. pp. 484-5-6.)

With reference to the stock to be turned over, Cassidy stated:

"And it was suggested that if this deal with Cassidy went through, Cassidy would relieve them of some of the stock, *which was naturally supposed to be salable stock, stock* that he could

> sell. So they said that was perfectly agreeable to them." (Trans. p. 486.)

A motion was made to strike out what he *naturally supposed,* that he should tell the conversation of defendants and not state conclusions. He then said, "Well, *there was no specific stock specified.*" (Trans. p. 486.)

Cassidy wanted stock immediately.

> "Q. Did you have any conversation with Munnell & Sherrill regarding the *character of the stock* that was to be turned over to Cassidy?
>
> "A. No."

He said that Cassidy on examining the list which Fitzgerald had made said there was a lot of old stuff there he could not use; that he wanted current merchandise, popular stuff, (Trans. p. 487), but Fitzgerald fails to add what Cassidy had testified and which the defendants had testified, that Cassidy was to take the tires and whatever he had left he would ship to 'Frisco. Cassidy testified that it was not agreed that he should only take from defendants the current salable stock. (Trans. p. 453.) Fitzgerald testified that there were no definite instructions given as to what particular style, size or quantity were to be turned over by defendants to Cassidy. He said that it was agreed that Cassidy was to take over the Mohawk line, that he was to draw on defendants' stock until he got his factory supply of tires. (Trans. p. 488.)

It is apparent that there is an irreconcilable conflict in the testimony of Fitzgerald and plaintiff's witness, Cassidy, as well as in his testimony and the testimony of defendants and Auspach.

From the foregoing testimony it is very clear that the questions involved in this case were clearly questions for the determination of the jury. It is very clear to our mind that the jury were warranted in finding under the facts that the agreements were made with the defendants through Fitzgerald as contended for by the defendants.

QUESTION OF THE AUTHORITY OF FITZGERALD

In the motion for a directed verdict and in the assignments of error the appellant contends that Fitzgerald had no authority to make the agreements, which the defendants claim he did make on behalf of the plaintiff, and in support thereof will urge the testimony given by Mason and Fitzgerald as to Fitzgerald's authority and the letters written by Fitzgerald as to Fitzgerald's authority and the letters written by Fitzgerald and Mason to the defendants. We will not attempt to analyze this testimony upon which the appellant relies, as we shall hereafter point out, the testimony does show authority in Fitzgerald, but that the court may have before it succinctly the pages of the transcript upon which we presume the appellant will rely, we call attention to the pages wherein this question of authority is mentioned:

Transcript pages 119, 120, 121, 122, 123, 131, 140, 147, 188, 425, 426, 428, 429, 466, 470-472, 491-492-493-494, 503, 504, 505.

In the case of Hinton vs. Roethlar, 90 Oreg. 440, 177 Pac. 59, the Supreme Court of Oregon has held that agency may be proved by the testimony of the alleged agent. It has been frequently contended, and appellant may contend the same in this case, that the scope of agency of Fitzgerald cannot be proven by his testimony. This contention, however, is erroneous. In the case just cited, the supreme Court of Oregon (90 Ore. 440 at 447) found in reference to a like contention:

> "This argument is based upon the contention that Adrian's agency could not be proved by his testimony, though appearing with surprising frequency, is without actual support, for to repeat what was said in Larkin vs. Carstens Packing Co. (80 Ore. 104, 106) (156 Pac. 578), the right to prove a parole agency by testimony of the person who claims to be the agent is not even open to debate."

The Larkin case cited held as follows:

> "The rule which prohibits third persons from testifying to extrajudicial declarations made by the alleged agent before trial has no application to the instant controversy. Here an attempt was made to prove the non-existence of agency in a single transaction. The right to prove a parole agency by testimony of the person who claims to be the agent is not even open to de-

> bate: Spande vs. Western Life Indemnity Co., 61 Ore. 220, 232. (117 Pac. 973, 122 Pac. 38); 10 Ency. Ev. 14; 31 Cyc. 1651; 1 Am. & Eng. Ency. of Law (2 ed.), 969; 2 C. J. 933, 935; 1 Mechem, Agency (2 ed.) 291; Wicktorwitz v. Farmers' and Merchants' Ins. Co., 31 Or. 569, 575 (51 Pac. 75). The alleged agent is likewise available as a witness to testify to the non-existence of an agency, and therefore, if Thomas Carstens was not acting for the Oregon corporation, it was competent for him to say so under the circumstances presented by the bill of exceptions and accompanying transcript of the testimony: 2 C. J. 935; Dowell v. Williams, 33 Kan. 319 (6 Pac. 600)."

It is very clear, therefore, that under the laws of Oregon it was competent for the *plaintiff* to *prove or disprove* the agency of Fitzgerald *by his own testimony*, and it was likewise competent for the *defendants* on cross-examination of Fitzgerald to *prove through him the fact of his agency and authority* to do the particular thing which he did do, and in addition to this, *an agent has the authority* to do the things *which are incidental* to the main transaction or settlement and within the general scope of such agent's authority. Bauer v. Northwest Blow Pipe Co. 75 Ore. 1, 6; 146 Pac. 129.

In the letter of November 10, 1920, Exhibit KK, (Trans. p. 188), which appellant relied upon in the lower court, we find Fitzgerald writing to the defendants as follows:

> "You must not forget that the writer's authority with this company is limited to certain matters, such as the selling of goods, *territorial arrangements, etc.,* but when it comes to credits, return of unsold merchandise and things of that caliber, you are dealing with our Credit Department, because after we have made a sale of goods then the matter passes out of our hands to those of the Credit Department at Akron, and we have no authority to take action on matters pertaining to their department."

In this letter of November 10th Fitzgerald was writing about the request of defendants to return goods to the plaintiff, not with reference to the power of Fitzgerald when he was making territorial arrangements and the transfer of the agency from the defendants to Cassidy. It is clear under the law that if Fitzgerald had power *to make territorial arrangements,* which included the taking of the agency away from defendants and giving it to Cassidy, that in the consummation of such territorial arrangements, to-wit, the surrendering of the territory held by the defendants and the giving of same to another, that Fitzgerald had all the powers which are *necessarily incident* to consummating such a transaction with reference to such territorial arrangements.

In the second place, upon the contention of appellant that there is no proof of authority, we have the testimony of W. G. Fitzgerald himself.

It is very clear from the evidence heretofore narrated that there is a sharp conflict in the testimony of the

plaintiff's witnesses and the defendants' witnesses as to what Fitzgerald actually agreed to do on behalf of his company. The defendants claim that he made the arrangements which we have pleaded. The plaintiff denies that he made the arrangements, and denies that he had the authority to make the agreement, so the first question is, is there any evidence that he did make the agreement, and, secondly, if he made the agreement, did he have authority to do so?. It is very clear that there is plenty of testimony in the record that Fitzgerald made the agreement, if the testimony of the defendants and their witnesses is to be believed, and the verdict of the jury shows that the jury did believe their testimony.

There being evidence that Fitzgerald made the agreements, which defendants claim he made, the question is, did Fitzgerald have authority to make such agreements? Fitzgerald testified that he had no instructions as to his *authority in writing.*

> "Q. And as far as any persons dealing with you were concerned, they wouldn't know when they dealt with you, as to whether you were acting within or without the scope of your authority, unless you told them?
>
> "A. Well, I don't know whether they would or not. I generally tell people just how far—I tell my customers just how far my authority extends.
>
> "Q. In other words, when you don't do a thing you tell them you will have to take it up with the factory?

"A. *That is true.*

"Q. And if you do a thing, or consummate a certain transaction with them, you don't tell them that you are doing something that you didn't have authority to do, do you?

"A. Whenever I consummate a transaction with a customer, fully consummate it, it was not necessary for me to tell that.

"Q. In other words, *the things that you did---*

"A. *I was within my authority.*

"Q. *The contracts you did make and the deals you did consummate with the people with whom you dealt, you did have authority for those things, didn't you?*

"A. *I did.*" (Trans. pp. 491-492.)

In denying appellant's motion for a directed verdict, the *trial court* very clearly remembered this testimony. In this motion the appellant made the same claim of lack of authority of Fitzgerald, and the court said:

"I think his authority is a question for the jury. *Mr. Fitzgerald testified that he had authority to make any contract that he did make.*" (Trans. p. 518.)

That the authority of an agent may be proved by the testimony of the alleged agent in court is well settled in Oregon. Hinton v. Roethler, 90 Ore. 440-447. 177 Pac.

59, 61, (3). Larkins v. Carstens Packing Co., 80 Ore., 104, 106, 156. Pac. 578.

The right to prove the agency by the testimony of the agent is not open to dispute, therefore, when Fitzgerald testified that he had authority to make the agreement he did make, and the evidence being in conflict as to whether he made the agreement claimed, and the jury by its verdict having found as a matter of fact that he did make the agreement claimed, there is no question left for this court to consider as to the authority of Fitzgerald.

ASSIGNMENTS OF ERROR

It is fundamental appellate practice that the appellate court will on appeal review only the alleged errors which are specified in the assignments of error. It is further a fundamental rule that each assignment must particularly and separately set out each error asserted and maintained to be relied upon and urged. Simpkins Federal Practice, Rev. Ed., p. 190. The alleged error of law assigned must be sufficiently specific so that the understanding and attention of the court is at once arrested without being forced to search the record to determine what the issue is. Simpkins Federal Practice, supra, 190.

In plaintiff's motion for a new trial there is alleged as a basis therefor, "Misconduct of the defendants." (Trans. p. 532.)

In the assignments of error (Trans. pp. 544-546)

there is *no assignment* setting forth that error was committed in the trial by reason of the alleged misconduct of defendants or of attorneys for defendants. The only assignment of error even squinting at alleged misconduct is assignment IV, which is to the effect that:

> "The court erred in denying plaintiff's motion to set aside the verdict and judgment thereon, and to grant a new trial, which motion was based upon the following grounds:"

then setting forth the grounds upon which the *motion for the new trial* was based, one of which grounds set forth in the motion for new trial was alleged "misconduct of counsel for defendants in bringing to the attention of the jury on numerous occasions prejudicial matter after the court had repeatedly ruled that such matters were immaterial and not within the issues." (Trans. p. 546).

This assignment is clearly on its face not an assignment of error that there was misconduct of counsel for defendants in the alleged respect mentioned, but is merely an assignment of error to the effect that the court erred in denying the motion for a new trial for said alleged misconduct and insufficiency of the evidence. In other words, the assignment of error, *when analyzed,* assigns error *in denying the motion for new trial* and *does not assign error for alleged misconduct,* and, accordingly, the court cannot consider whether there was any such alleged misconduct, for the simple reason that it has not been assigned and the denial of a motion for new trial is within the exclusive jurisdiction of the trial court and

the appellate court will not consider alleged error of the trial court in denying the motion for new trial.

The following authorities clearly establish that the granting or refusal of a motion for new trial is within the sound discretion of the trial court and is not subject to review on a writ of error in the appellate court. Goff v. U. S., 281 Fed. 822, 823, (C. C. A. 8 Cir.), citing authorities; Yellow Cab Co. v. Earle, 275 Fed. 928, 930, (C. C. A. 8 Cir.), Cer. Den. 255, U. S. 624, 66 L. Ed. 797; Greenburg v. U. S. 285 Fed. 865, 866, (C. C. A. 8 Cir.); Slip Scharff Co. v. W. M. Filene's Sons Co., 289 Fed., 641, 646, (C. C. A. 1st Cir.); Adams Express Co. v. Darden, 286 Fed., 61, 68, (C. C. A. 6th Cir.).

Furthermore Assignment of Error number IV presents nothing for the determination of this court, as that assignment does not contain the record or the statements from the record which it is claimed were erroneous. It is necessary for this court and for the appellee to hunt through the record to ascertain what appellant refers to in assignment of error number IV. The assignment of error alleges that the motion for new trial was based upon alleged misconduct of counsel in bringing to the attention of the jury on numerous occasions alleged prejudicial matters. *What this alleged prejudicial matter is* the assignment does not show, neither does the assignment show that the alleged prejudicial matter was *excepted to.* It is necessary to hunt through the transcript and speculate what the appellant will urge on this

appeal in reference to this matter. As we understand Rule 11 of the rules of this court, it is necessary for the appellant in the assignments of error to set forth the substance of what occurred at the trial so that the court and appellee may understand what is being urged as error, and to enable the court to ascertain whether it is apparent that there is manifest error therein. The assignments of error do not comply with the rules in this respect, and therefore, present nothing for the consideration of this court. The alleged error in this case can only be ascertained by searching the record. The "full substance" of the error is not shown or any *substance* thereof. Piper v. Cashell, 122 Fed. 614, 616, (C. C. A. 9th Cir.) ; Davidson S. S. Co. v. U. S., 142 Fed. 315, 318, (C. C. A. 8th Cir.) ; City of Grafton v. Gentry Bros. Shows, 240 Fed. 646, 648, (C. C. A. 4th Cir.) ; H. E. Winterton Gum Co. v. Auto Sales Gum & Chocolate Co., 211 Fed., 614, 618, (C. C. A. 6th Cir.) ; Cisco v. Looper, 236 Fed., 336, 338, (C. C. A. 8th Cir.) ; R. D. Cole Mfg. Co. v. Mendenball, 240 Fed., 641, 643, (C. C. A. 4th Cir.)

Searching the record, we find on page 37 of the transcript the opening statement of counsel. As he was making his opening statement, the appellant objected to certain matters stated, and the court said, "Let him state his case." The plaintiff thereupon saved an exception to the statement and ruling. This opening statement was not evidence, and during the trial the court refused to permit defendants to offer evidence on the matter. After objection was made by appellant to the opening statement, it is apparent that *nothing further was said* in ref-

erence to that matter, no motion was made to strike out the statement, nor was any motion later made requesting the court to instruct the jury to disregard the statement, and when the court later on sustained an objection to the admission of testimony upon this line, it is very clear that the opening statement could have had no effect on a jury which was sworn to decide a case *under the evidence adduced* on the trial.

Though the motion for new trial alleges that there was misconduct by the defendants, and though there is no assignment of error alleging misconduct of defendants or of their attorneys (the assignment being as heretofore noted merely that the court erred in overruling the motion for new trial based upon alleged misconduct), and though we do not know what prejudicial matters at the time this brief is being written (which is before the service of brief of appellant) were brought to the attention of the jury, we will assume for the purpose of argument that appellant is relying upon alleged irregularities claimed to have occurred at the trial with reference to the condition of the Mohawk tires. It is fundamental that the court of appeals is an appellate court in this case only, and will review only errors properly presented to it.

NECESSITY OF EXCEPTIONS

It is a fundamental rule that alleged errors in rulings of law in the course of a trial are not reviewed by writ of error unless they are *excepted to* at the time the rulings are made, and incorporated into the record by

bills of exception or other equivalent proceedings, and as we contend, the errors excepted to must be specified in the assignments of error. It is fundamental that there must be an exception to an alleged erroneous ruling. Ana Maria Sugar Co., Inc., v. Quinones, 251 Fed. 499, 504, (C. C. A. 1st Cir.); United Verde Extension Co. v. Koso, 273 Fed., 369, 373, (C. C. A. 9th Cir.), (affirmed on writ of Certiorari, 254 U. S. 245, 251, 65 L. Ed. 246, 249), wherein the court said.

> "Inasmuch as the record fails to show that the defendant urged an exception to the ruling of the court, there is no question for decision."

Same rule is stated in Wear v. Imperial Window Glass Co., 224 Fed., 60, 63, (C. C. A. 8th Cir.); and in Goldfarb v. Keener, 263 Fed., 357-359, (C. C. A. 2nd Cir.), wherein this Court after a discussion of appellate practice, said:

> "It seems to be thought that an assignment of error should dispense with the necessity of exception. This is a fundamental mistake."

Mound Coal Co. v. Jeffrey Mfg. Co., 233 Fed., 913, 918, (C. C. A. 4th Cir.); International Lumber Co. v. U. S., 231 Fed., 873, 875, (C. C. A. 8th Cir.); Netherlands American Steam Nav. Co. v. Diamond, 128 Fed., 570, 574, (C. C. A. 2nd Cir.), (see second syllabus); Chicago B. & Q. Ry. Co. v. Frye Bruhn Co., 184 Fed., 15, 18, (C. C. A. 8th Cir.); Skeele Coal Co. v. Arnold, 200 Fed. 393, 395, (C. C. A. 2nd Cir.).

In Oregon the rule is substantially the same as in the Federal Courts.

> "Only error which is legally excepted to can be used to defeat a judgment. This has been the procedure in this court since Kearny v. Snodgrass, 12 Ore., 311; 7 Pac. 309."

Bagley Co. v. International Harvester Co., 99, Ore., 519, 524, 195 Pac. 348, 349.

> "It has been held since the earliest judicial times in this state that only for error legally excepted to will a decision of the circuit court be reversed. This precludes further examination of the instant case."

Douglas Creditors Ass'n. v. Hutcheson, 81, Ore., 644, 645, 160 Pac. 539.

Searching the transcript we find that testimony of both the plaintiff and the defendant with reference to the quality of Mohawk tires was received without objection. In Exhibit O (Trans. p. 143) offered by *plaintiff*, there is a reference to the tires coming back from the customers. In exhibit P offered by *plaintiff* (Trans. p. 145) is another reference to the same thing. In Exhibit S, a letter from the plaintiff, offered by *plaintiff*, (Trans. p. 151) is a reference to the trouble with the treads, stating that in the *majority* of cases it was not the fault of the tires, clearly implying that in many cases it *was the fault* of the tires. Exhibit V, offered by *plaintiff* (Trans. p. 157) is a telegram showing the stock

is accumulating. In Exhibit KK, a letter from plaintiff and offered by *plaintiff*, is a statement that the Mohawk tires have survived the then conditions, and that they are *quality merchandise*. (Trans. p. 191.) Exhibit YY is a letter offered by *plaintiff*, wherein there is a reference to the tires being returned, (Trans. p. 223), and in the same letter (Trans. p. 224) defendants had enclosed a letter showing the reason that the tires were returned by one of their best customers, namely, Clark & Miles. Exhibit 21 is a letter from defendants offered in evidence *without objection*, (Trans. p. 297) enclosing letter from Clark & Miles. See also page 305 at 307, defendants' Exhibit 27, a letter to plaintiff from defendants received without objection. In it is a statement that the line had not proven satisfactory from a quality standpoint. (Trans. p. 307.) Exhibit 45 is a letter from plaintiff to defendants, received without objection. There is a statement to the effect that the quality of Mohawk products is superior and will be kept so. (Trans. p. 369.) This letter was received without objection. It should be noted that all of these letters and telegrams passing between the respective parties were received not only *without exception* but *without objection*. Defendants claimed rebate, the right to return goods, and a settlement of the note set forth in the third cause of action. Defendants considered that for the purpose of enabling the jury to ascertain the intrinsic probability that the plaintiff had made the agreement with the defendants relied on, that if plaintiff had turned over tires to the defendants, representing them to be of fine quality, and the tires had proven to be

defective, that that situation was a moral consideration which the plaintiff had in mind *when it did make the arrangement with the defendants* to take back tires and to give defendants credit on account of price decline when the defendants were compelled to take tires back by reason of the poor quality, and with this in mind, the plaintiff made the opening statement shown on page 37 of the transcript, and when objection was made nothing further was said.

On page 90 of the transcript defendants propounded a question to Sherrill, which the court of its own volition refused permission to answer. There is *no objection* by the plaintiff to this question, *nor is there any exception.* There is nothing here before the court.

As shown by the correspondence between the parties, Clark & Miles returned a great amount of tires. Defendants' Exhibit 21, (Trans. p. 297) was offered and received *without objection.* Plaintiff then asked the witness to explain what the letter from Clark & Miles sent to the defendants and referred to in Exhibit 21 was about. The questions were objected to and sustained by the court. *There is no exception,* and under the ruling of the court, where the *question was not permitted to be answered,* there is nothing for this court to pass on. Furthermore, there being no exception, there is an additional reason why there is nothing for this court to pass upon.

OFFER OF PROOF

At page 268 of the transcript, the defendants called

W. D. Miles and propounded a few questions to him, which it seemed to defendants were perfectly admissible under the correspondence, and for the purpose of showing matters of inducement, which caused the plaintiff to make the agreement claimed. Objections were made to the questions. An argument then took place before the court by one of the attorneys for defendants. The court (Trans. p. 267) in answer to the objections, stated: "I can't tell anything about it until I know what they expect to prove." Thereafter, defendants asked this witness, "How long did you handle the Mohawk tires?" This question was objected to. Defendants thereupon made *an offer of proof* to the court. The court denied the offer. Plaintiff then assigned as misconduct the remarks of the counsel to the court. (Trans. p. 271.) It seems, therefore, that plaintiff is claiming that a defendant has no right to make an offer of proof without being guilty of erroneous conduct.

Under the conformity statute (Revised Stat. Sec. 914; Comp. St. Sec. 1537), we understand that in the trial of a law action in the Federal court that the law of Oregon is the law applicable to the case. The court must remember that it was the duty of both parties to present the facts to the jury. At this stage of the trial it seemed necessary to the defendants to make a showing why Clark and Miles had returned such a large quantity of merchandise. The testimony was objected to, and the court sustained the objection. The defendants then thought, and still feel, that the court excluded testimony that the defendants were properly entitled to, and to

protect their rights, the defendants felt it necessary to make an offer of proof, in conformity with the usual practice.

Several circuit courts of appeal have held that it is *necessary* under Rule 11 to make an offer of proof in the trial court in order to save an exception as to rulings excluding evidence so that the appellate court may ascertain what the parties offering the evidence expected to prove, and that the trial court might know what they expected to prove and ascertain whether such proof was admissible, and the courts have held that in order to save an exception to an order excluding an offer of proof it is *necessary* to make a showing as to *what the proof will be.* Victor Talking Machine Co. v. Straus, 280 Fed., 717, 718, (C. C. A. 2nd Cir.); Sun Publishing Co. v. Lake Erie Asphalt Block Co., 157 Fed., 80, 82, (C. C. A. 8th Cir.); Camp Mfg. Co. v. Beck, 283 Fed., 705, 6, (C. C. A. 4th Cir.). The same rule is stated in Shauer v. Alterton, 151 U. S., 607, 616, 38 L. Ed. 288; and in Buckstaff v. Russell, 151 U. S., 626, 636, 39 L. Ed. 292, 296, the same rule is given with some qualifications, and in Kansas City S. R. Co. v. Jones, 241 U. S. 181, 2, (60 L. Ed. 943, 945), the Supreme Court of the United States calls attention that where there is a state law requiring a statement of what it was expected to prove, it is necessary to make such a statement with an exception taken in order to present the question for review. Accordingly, in this matter, it is clear that the proper practice where the court excludes testimony is determined by the Oregon law.

In Oregon it has been held in many cases that it is necessary where the court sustains an objection to a question that unless the question so clearly indicates what the expected answer will be, that it is necessary in order to preserve the question of correctness of the court's ruling, to make an offer of proof. The following cases exemplify the rule. In Booth Kelley Lumber Co. v. Williams, 95 Ore., 476, 482-4, 188 Pac. 213, 215, the court said that the offer of proof must be of evidentary facts sufficiently specific to enable the court to determine if there was any error in excluding it, citing Hill v. M. C. Crow, 88 Ore., 299, 309; 170 Pac. 307, 309; which case in turn cites Columbia Realty Investment Co. v. Alameda Land Co., 87 Ore., 277, 293, 296, 168 Pac. 440. In this case the court said that the practice in Oregon is to incorporate in the bills of exceptions the offer of proof:

> "An offer of proof should state facts rather than conclusions, its language should not be vague but distinct, not general, but specific. It is not sufficient that it state the ultimate facts in language appropriate to a pleading, but the *evidentary facts* must be set out."

In Ashmun v. Nichols, 92 Ore. 223, 231, 178 Pac. 234, 236, the court held that,

> "It is necessary, to make the matter available for review on appeal, to make a showing or offer as to what would have been the proof if the witness had been called to testify."

Accordingly, it was only *not error* for the defendants to make an offer of proof as to what they expected the witness Miles to testify, but it was the *duty of defendants,* in order to preserve the question of error of the court in excluding the testimony, to make such an offer of proof, and how there could be misconduct in doing that which the Supreme Court of Oregon says must be done, we do not understand. Furthermore, the court sustained the objection to the offer of proof and would not permit the evidence to go in, and surely this ruling in favor of appellant cannot now be assigned as error against it.

On page 406 of the transcript the defendants asked the witness how much stock of Clark & Miles was returned to them. This question was objected to, an argument was made to the court why it should be answered, and the court *sustained* the objection. *No exception* was taken and there is nothing before the court to review. No erroneous rule of the court can be pointed out. Furthermore, the correspondence offered *by the plaintiff,* we think, clearly should have rendered the answer admissible.

On page 446 of the transcript a question was asked a witness and objection taken, and an emphatic ruling of the court sustained the objection. No ruling of the court against appellee can be found. There was *no exception* taken and there is nothing for this court to review. Accordingly, this contention of appellant resolves itself into merely three points: In the record, page 37 of

the transcript, where a preliminary statement was made and objection offered, overruled by the court and nothing further said; on page 268 of the transcript, the calling of a witness, the propounding of questions, an objection thereto, an offer of proof and the sustaining of objections by the court, then an assignment that the offer of proof was misconduct; (Trans. p. 272); on page 406 of the transcript, the propounding of a question to a witness, an objection thereto, an offer of proof, the sustaining of the objection, and an assignment of misconduct as to the offer of proof. Wherein under the authorities, there can be error in making a statement to the court and an argument to the court as to why certain proffered evidence is competent or relevant, we do not know. The counsel for defendants made the kind of offer which the practice in Oregon requires should be made, and which many Federal decisions say is the proper method to preserve an exception. If the verdict in this case had been against the defendants, it is clear that the defendants were entitled to know whether the evidence which they wished to offer was competent or not, and in order to preserve that question for review in event the verdict had been against the defendants, it was necessary for the defendants and their attorneys, in the preservation of defendants' rights, to make an offer of proof. On this branch of the case, however, we wish to again urge that the *assignment of error presents nothing for this court to review.* If it is necessary, under the law, to preserve the correctness of an order excluding testimony, to make an offer of proof, so

that that offer of proof may go into the bill of exception and be set forth in the assignment of errors, so that the court upon the inspection of the assignment of errors can ascertain whether the proof should be admitted, clearly no less a stringent law must be imposed upon appellant here in requiring it to set forth in its assignment of errors specifically what occurred at the trial, so that the court upon inspection of assignment can ascertain whether there was error. Rule 11 of this court clearly contemplates that that is required. Appellant has not complied with Rule 11 in reference to its fourth assignment, and there is nothing before the court to review. Appellant has not set forth in its assignment of errors wherein the alleged misconduct occurred nor in what it consisted. What the alleged misconduct it complains of is, we can only guess, and we expect *we will be informed when we get the brief of appellant.* The assignments of errors, however, is the place where the appellant is required to set forth the full substance of the error relied on and it has not done so.

ASSIGNMENTS NOT SEPARATELY STATED

In assignment of error numbered I, (Trans. p. 544), appellant urges that the court erred in that the evidence in the record is insufficient to support the verdict for three reasons, namely:

1st. There is no evidence that W. G. Fitzgerald . . . . had authority to make and bind the plaintiff by said contracts;

2nd. There is no evidence in the record to establish the contracts set forth in defendants' answer;

3rd. The contracts attempted to be established by defendants are at variance with the contracts set forth in the answer.

In assignment of error numbered II, appellant alleges that the court erred in overruling the motion for directed verdict, and that there was no evidence to establish the defense set forth in the answer for the same *three reasons* above specified.

In assignment of error numbered III, appellant alleges that the court erred in admitting testimony of conversations with W. G. Fitzgerald as evidence of contracts alleged to have been made with him because there was no evidence establishing the scope of Fitzgerald's authority to bind the plaintiff.

An inspection of these assignments shows that the reasons assigned are in triplicate, and the assignments stating wherein the court erred are not separately stated.

In the case of Savage v. U. S., 270 Fed. 14, 20, (C.C. A. 8th Cir.), the first assignment of error relied on related to rulings upon admission in evidence of portions of testimony of agent's different witnesses relating to this subject. The second assignment related to error in admitting in error 100 different exhibits. The court said:

> "This is a violation of Rule 11 of the Court of Appeals rules, which requires that each error shall be set out separately and particularly,"

citing Davidson S. S. Co. v. U. S., 142 Fed., 315, 318; Empire State Cattle Co. v. Atchison T. & S. F. Ry. Co., 147 Fed., 457, and Smith v. Hopkins, 120 Fed., 921, 923. The cases cited clearly bear out the rule stated in the Savage case.

In Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co., 147 Fed. 457, 461 (C. C. A. 8th Cir.) the court said with reference to one of the assignments of error: That the trial court erred "after refusal of plaintiff's request for a peremptory instruction in refusing to charge the jury, at plaintiff's request, instructions numbered 1 to 13, inclusive. Under repeated decisions of this court applying the 11th rule, this assignment presents no question challenging the attention of the court to the merits of the several requests." See also Herrington v. U. S., 267 Fed. 77, 104 (8), (C. C. A. 8th Cir.).

QUESTION OF VARIANCE

Considering the three points upon the merits alleged in assignments numbered 1 and 2, the recitation of the evidence heretofore made has sufficiently disposed of the first claim that there is no evidence that Fitzgerald had authority to make and bind plaintiff by the contracts alleged, and the second point that there is no evidence in the record to establish the contracts set forth in de-

fendants' answer. This second point is clearly analagous to the third to the effect that there is a variance.

Upon this question we submit that the record shows that there was no motion to strike or any demurrer to any portion of defendants' answer, and in the second place, there was no objection to the testimony offered by the defendants other than a few sporadic objections. It is well settled that objections on the ground of variance between averment and proof must be taken when the evidence is offered, *otherwise it will be deemed to be waived.*

If the evidence is sufficient to support the verdict, as it was in this case, mere defects of averment in the pleadings are cured. Preiss v. Zitt, 148 Fed., 617, 618, (C. C. A. 8th Cir.), citing Nashua Savings Bank v. Anglo Amer. Co., 189 U. S., 221, 231, 47 L. Ed. 782; and Roberts v. Graham, 6 Wall. (U. S.) 578, 18 L. Ed. 791; Thompson Sterrett Co. v. Fitzgerald, 149 Fed., 721, 723, (C. C. A. 7th Cir.).

In *Phoenix Securities Co. v. Dittmar,* 224 Fed. 892, 895-6 (C. C. A. 9th Cir.), this court said:

> "It is contended that it was error to admit evidence of reasonable value of the plaintiff's service for the further reason that no evidence was adduced to prove the express promise to pay such reasonable value which was alleged in the second county, and that therefore there was variance between the complaint and the evidence

> which was so received and objected to. But, if there was such variance as is now alleged, the right to predicate error on the admission of such testimony *was waived* by the defendant's failure to *present specifically that ground of objection* at the time when the testimony was offered."

And in *Twin City Fire Ins. Co. v. Stockmen's National Bank,* 261 Fed. 470, 474 (C. C. A. 9th Cir.), this court said:

> "If there was variance between the allegations of the complaint and the proofs, that fact cannot avail the defendants in this court, for the reason that no such variance was brought to the attention of the court below. *Roberts v. Graham,* 6 Wall. 578, 18 L. Ed. 791; *Insurance Sav. Bank v. Anglo-American Co.,* 189 U. S. 221, 23 Sup. Ct. 517, 47 L. Ed. 782; *Preiss v. Zitt,* 148 Fed. 617, 78 C. C. A. 56; *Phoenix Securities Co. v. Dittmar,* 224 Fed. 892, 140 C. C. A. 336."

It is well settled that a pleading is aided by the verdict where the pleading is not attacked by demurrer or otherwise, in the court below. *Duluth R. R. Co. v. Speaks,* 204 Fed. 573, 576. (C. C. A. 8th Cir.)

Evidence Sufficient

The law as to variance settled by verdict and the effect of a motion for directed verdict which is denied, where the verdict of the jury is against the parties requesting the directed verdict, are set forth in the following authorities by the Supreme Court of Oregon:

In *Sherman Clay v. Buffman & Pendleton,* 91 Ore. 352, 360, 179 Pac. 352, a case involving the question of the authority of a managing agent of plaintiff, there was a motion for a directed verdict, the court said:

> "A motion for a directed verdict is equivalent to a demurrer to the evidence. It *admits the truth* of the evidence given by the party against whom the verdict is directed and also such references and conclusions as are reasonably deducible therefrom: *Ruber v. Miller,* 41 Ore. 103, (68 Pac. 400)," (p. 360, 171 Pac. 241).

In *Ridley v. Portland Taxicab Co.,* 90 Ore. 529, 533-5, 177 Pac. 429, 430-1, the court said:

> "A motion for an involuntary judgment of nonsuit is in the nature of a demurrer to the evidence for the plaintiff: *Brown v. Oregon Lumber Co.,* 24 Ore. 317 (33 Pac. 557). The judge is called upon to decide whether there would be a 'want of evidence to support' a verdict for the plaintiff even though all the evidence for the plaintiff is assumed to be true, Section 183, L. O. L. A motion for a directed verdict presents the same question for decision as does a motion for a judgment of nonsuit; but the plaintiff is, of course, entitled to the benefit not only of his own evidence, but also to the benefit of any evidence favorable to him though introduced by the defendant: *Huber v. Miller,* 41 Ore. 103, 110 (68 Pac. 440); *Merrill v. Missouri Bridge Co.,* 69 Pr. 585, 593 (140 Pac. 439). While a motion for a nonsuit and a motion for a directed verdict give rise to the same inquiry the result of an

approving decision is not the same. A judgment of nonsuit operates merely as a dismissal of the action: 184 L. O. L.; *Mallory v. Marshall Wells Hdw. Co. ante*, p. 303 (175 Pac. 661); but a judgment on a directed verdict concludes the controversy: *Huber v. Miller*, 41 Ore. 103, 110 (68 Pac. 400). A motion for a directed verdict as well as a motion for an involuntary judgment of nonsuit challenges the legal sufficiency of the evidence. Each of these motions performs the same function in connection with the evidence as does a demurrer in connection with a pleading, but neither of these motions is designed to perform the function of a demurrer to a pleading.

"Even though a complaint omits some material allegation a motion for a directed verdict, based upon the fact of such omission, should be denied, especially where the objection can be cured by an amendment and the plaintiff's evidence, if true, makes a case against the defendant. (Citing cases.)

"Of course, a different question would be presented and a different result might follow if the evidence conclusively showed that the plaintiff was without a cause of action. It must be remembered that a judgment on a directed verdict concludes the controversy; and hence if it is permissible to direct a verdict for a defendant merely because the complaint has omitted some *material allegation*, which can be supplied by an amendment, and in despite of the fact that the plaintiff has offered evidence which would be sufficient to support a verdict for him *if accompanied by a*

good instead of a bad complaint, it would result in defeating the purpose of amendments and frequently would end in the complete denial of a right by the simple but indefensible act of closing the doors to the truth. If therefore, the record brought before us contains evidence which, when accompanied by a good pleading and if believed by a jury, would be legally sufficient to support a verdict for the plaintiff, then it was error to allow the motion for a directed verdict on account of any failure of the complaint to allege that the defendant knew or ought to have known that it furnished a defective wrench. *Ridley v. Portland Taxicab Co.,* 90 Ore. 529, 533-535, 177 Pac. 429, 430-431." (Court accordingly held that it was error to direct a verdict for failure to make allegation stated.)

The Ridley case was followed in *Emmons v. Southern Pacific Co.,* 97 Or. 263, 295, 191 Pac. 333, 343.

The Ridley case is cited in *Parks v. Keeney,* 105 Or. 277, 279, where motion allowed and case as proved showed neither the action pleaded *or any action at all;* 209 Pac. 497; the exception to the rule being accordingly invoked.

In Oregon, Article VII, Section 3C of the Constitution, provides that:

"No fact tried by a jury shall be otherwise re-examined in any court of this state unless the court can affirmatively say there is no evidence to support the verdict."

Under this provision the state appellate court is precluded from considering questions of fact where there is *any* evidence supporting the verdict. *Kahn v. Home Tel. & Tel. Co.,* 78 Ore. 308, 317; 152 Pac. 240, 242; *Reed v. National Hospital Assn.,* 106 Ore. 471, 482; 212 Pac. 537, 541 (3); *Sou. Ore. Orchards Co. v. Bakke,* 106 Ore. 20, 25; 210 Pac. 858, 860 (1); *Mitchell v. S. P. Co.,* 105 Ore. 310, 317; 209 Pac. 718, 720 (4); *Derrick v. Portland Eye, Ear, Nose & Throat Hospital,* 105 Ore. 90, 98 (4); 209 Pac. 344, 347 (4).

In *Doherty v. Hazelwood Co.,* 90 Ore. 475, 478; 175 Pac. 849, the Supreme Court of Oregon said:

> "It is axiomatic that a motion for a directed verdict must be overruled, and the question at issue must in the first instance be submitted to the jury *if there is any evidence* which the jury is entitled to consider as against the ruling party."

Thus in Oregon the rule is that if there is any evidence to support the verdict, the verdict must stand.

In *Toledo, St. L. & W. R. Co. v. Howell,* 191 Fed. 776, 780-1 (C. C. A. 6th Cir.), the court held that the weight of evidence is a matter which the appellate court of the United States has no power to consider, and that a motion for directed verdict must be overruled where the testimony presented by the plaintiff, if believed by the jury, will support the petition, citing authorities from U. S. Supreme Court and other Federal courts.

In *Hobbs v. Kiser,* 236 Fed. 681, 682 (C. C. A. 8th Cir.), the court said:

> "The well established rule is that on a motion for a directed verdict the court must take the view of the evidence most favorable to the adverse party."

Again on the same page the court said:

> "Another rule equally well established is that only when all reasonable men, in the honest exercise of a fair, impartial judgment, would draw the same conclusions from the facts which condition the issue, it is the duty of the court to withdraw that question from the jury,"

citing numerous authorities from the appellate and federal courts supporting the text. The court found the evidence was conflicting, and the court said, under Section 1011, Revised Statutes (Compiled Statutes 1913, Sec. 1672), "the jury's findings of facts on conflicting evidence is conclusive." (p. 685).

In this connection we call attention of the court that the charge of the court to the jury is unimpeachable as a matter of law. The appellant is entirely satisfied with the instructions given to the jury; no exception was taken to the instructions to the jury, and there is no assignment of error based upon the charge to the jury, and as stated by the Circuit Court of Appeals of the 6th Circuit in the case of *Carolina C. & O. R. Co. v. Stroup,* 239 Fed. 75, 79, wherein the court held there was no error in refusing to direct a verdict that:

> "We are the more content thus to dispose of the case because of the company's failure either to complain of the charge of the court or to in-

> clude it in the record; for such an omission gives rise to a presumption that the court instructed the jury as favorably for the defendant as the merits of the defense deserved."

In this case the appellant does not complain of the charge of the defendant to the jury, and we must presume that the appellant is satisfied that the court's instructions to the jury were as favorable for the plaintiff as the merits of the case deserved.

There is one other fundamental reason why the plaintiff is bound by the contract which Fitzgerald made, and that is because the appellant has ratified the contracts made by Fitzgerald by accepting the benefits of such contracts with knowledge of the facts.

Fitzgerald, on behalf of his company, agreed that the notes set forth in the third cause of action should be deemed satisfied. With this agreement in mind, the parties undertook to transfer defendants' stock to Cassidy, and defendants transferred to Cassidy stock sufficient to balance the account. If the defendants had not made the contract with the plaintiff for the consummation of said note, it is clear that the defendants would have been empowered to turn over to Cassidy additional tires according to the value of said note. That they did not do so is the strongest evidence of their understanding of the contract. Fitzgerald was familiar with the situation, and he made the contract providing for the transfer of the territory to Cassidy and the transfer of the stock of tires from the defendants. Thereafter, the

plaintiff with full knowledge of what has been done, issued credit to the defendants *for a portion* of the stock turned over. In other words, the plaintiff accepted as much of the contract as it thought was beneficial to it, and attempted to repudiate the remainder. The correspondence from the home office does not deny the power of Fitzgerald to make the *contracts* at the time of the transfer, which defendants claim *he did make,* but merely claims that he made the kind of a contract which the defendants claim he did make. It is very clear from the testimony of defendants, and from the testimony of their witness Auspach, and from the testimony of plaintiff's witness, Cassidy, that the contract was made as the defendants claim. The letters from the home office written after September 18, 1921, do not repudiate Fitzgerald's authority but simply urge that Fitzgerald did not make the kind of agreement which the evidence overwhelmingly shows that he did make. Exhibit 37 (trans., p. 315) acknowledges that defendants had transferred the greater portion of their stock to the American Tire & Rubber Co., and states that the matter of handling the line in Portland in the future is a matter which will be left to Fitzgerald. (Trans. p 317.) Exhibit GGG (trans. p. 273), dated November 14, 1921, is the letter attempting to back up Cassidy. Thereafter, and on November 29, 1921, a credit memorandum for $1,079.25 is issued to defendants. It is clear that the plaintiff ratified a portion of the agreement, and that being true, they are deemed to have accepted and ratified the entire agreement, for if a

principal elects to ratify a part of an alleged unauthorized act of an agent, he must ratify the whole. The principal cannot take the benefit of an alleged unauthorized contract without bearing its burdens. *Bauer v. N. W. Blow Pipe Co.,* 75 Or. 1, 5; 146 Pac. 129, 139 (1-4), citing cases; *Depot Realty Syndicate v. Enterprise Brewing Co.,* 87 Ore. 560, 575 (7), 171 Pac. 223-224 (2), citing among other authorities, 2 Corpus, p. 504, Section 124 and notes.

In Oregon it is good pleading to allege that an act was done by the defendant and it is competent to prove that averment by showing that the act was merely done by the agent of defendant thereunto duly authorized, or that it was afterwards ratified by the defendant. *Marsters v. Walker,* 89 Ore. 526, 529 (2), citing cases. 174 Pac. 1164 (2); *Hinton v. Roethler,* 90 Ore. 440, 448; 177 Pac. 59, 61 (4). The same rule is stated in *Scandinavian National Bank v. Wentworth Lumber Co.,* 101 Ore. 151, 157; 199 Pac. 624, 626 (5).

The Marsters case also reiterates the same rule that ratification subsequently by a principal with knowledge of the facts is equivalent to prior authorization. We claim under the records herein that the appellant with knowledge of the facts ratified a portion of Fitzgerald's acts. That being true, it is estopped from urging want of authority.

REPLY TO BRIEF OF PLAINTIFF IN ERROR

Most of the arguments presented by plaintiff in

error have been answered in the foregoing brief written before the receipt of plaintiff's brief, and we will not reiterate what has there been stated. We wish merely to briefly call to the attention of the Court some of the statements set forth in plaintiff's brief.

We cannot find that plaintiff makes any claim in its brief that there is any variance, and we shall accordingly take it for granted under the well settled rule that an error assigned but not urged in the brief is deemed abandoned.

Plaintiff's brief resolves itself into three questions. The substance of the first two assignments set forth on pages 1 and 2 of the brief, when analyzed, is to the effect *only* that there is no evidence that W. G. Fitzgerald had authority to make and bind the plaintiff by the contracts set forth in the answer. On page 4 of the brief, plaintiff in error gives its interpretation of Exhibit 7. This interpretation is so utterly at variance what with the testimony shows and with the instrument itself that we will not make any further comment than what we have heretofore stated.

The last paragraph on page 5 and running on to page 6 seems to state a contention that there was *no authority* in Fitzgerald to make the Cassidy deal in the form that we claim the evidence conclusively shows it was made. We feel that the unconscionable attitude of plaintiff in error is nowhere more plainly evidenced than in the improper attempt to repudiate the contract that Fitzgerald made with the plaintiff with reference to

turning over tires to Cassidy. The evidence is so overwhelming that plaintiff had the right to turn over to Cassidy the tires which they did turn over to him and to obtain credit therefor that the attempt to repudiate this agreement on the ground of want of authority appears exceedingly technical and trivial, as well as an unconscionable attempt to repudiate a clean-cut agreement, and it illustrates why the jury did not believe everything that plaintiff's witnesses testified to. No phrase can be found in a letter sent from Akron, Ohio, with reference to the Cassidy deal which seems to imply any limit upon the authority of Fitzgerald to make the Cassidy deal. As we have heretofore stated, the only thing contained in those letters was an attempt to back Fitzgerald up in his subsequent claim that he did not actually make the agreement which the letter and evidence plainly shows he did make. Furthermore, the testimony unqualifiedly shows that Fitzgerald had power to make "territorial arrangements." Under that express power he clearly had the right to make the Cassidy deal in the form the evidence shows that it actually was made.

The larger portion of plaintiff's brief is devoted to commenting upon portions of certain letters sent by Fitzgerald and by the Akron office to the defendants prior to the making of the notes of December 2, 1920. We have heretofore shown that the business relations of the parties are clearly divided by the period preceding the execution of these notes and by the contracts made at the time of the execution of the notes and the business

relations subsequently thereto. Statements of the plaintiff made prior to that time with reference to the authority of Fitzgerald cannot be considered as proof that Fitzgerald had no authority when the identical individual who, it is claimed made these limiting statements, subsequently by making the agreements which might be inconsistent with his prior statements, conclusively showed that he claimed then and had authority to do the things which he actually did do and to make the contracts which he did make. The evidence shows that any claim of limitation of authority of Fitzgerald *was never placed in writing. His authority was determined by parol* and hence when Fitzgerald orally agreed to do certain things, the defendants were clearly entitled to believe that he had apparent authority to make the agreement which he actually did make. The plaintiff in error would seek to impose upon a person dealing with the Pacific Coast manager the obligation of asking that person each time they dealt with him: "Have you the authority which you now appear to have and which you ostensibly seem to have in making the agreement which you now make?" The law requires no such questioning of the authority of the general agent.

On page 54 of the brief plaintiff in error attempts to explain away the testimony given by W. G. Fitzgerald and shown on pages 491 to 493 of the transcript of record, claiming first of all, that this testimony should be read in connection with the other testimony given by Fitzgerald, and that consequently his own evidence as to his authority is not binding upon the plaintiff.

In reference to the first contention upon the theory of the plaintiff in error, no Court could ever rely upon any statement of a witness if that statement though clear and unqualified must be considered qualified by everything that the witness has testified to. There was nothing in the examination of Mr. Fitzgerald to indicate that he was qualifying his testimony. The questions were clearly put to him and were as clearly answered. The answers were clear and unequivocal, and the attempt of the plaintiff and its counsel to read a qualification into testimony where none exists is destructive of the ordinary method by which courts and juries arrive at facts from the answers of witnesses. Courts cannot read into answers any qualification where the answers themselves are unqualified.

In reference to the second contention that the evidence of Fitzgerald does not bind the plaintiff, we have already seen that the agent may testify with reference to his agency. No objection was made to any question or answer of the witness, W. G. Fitzgerald, and when he testified that he, as Pacific Coast manager, had authority to do what he did do, and make the contracts he did make, and acted within his authority it was certainly competent evidence to go before the jury to determine whether he did have authority to make the agreement which the defendants claim he did make. If his testimony is not conclusive upon the plaintiff as plaintiff now asserts, it was certainly competent testimony to be considered by the jury in determining the scope of Fitzgerald's evidence. Fitzgerald did not testify as to

his *opinion* as to the extent of his authority. He testified as to the fact of his authority. He testified plainly, clearly, concisely and emphatically. Who should know the authority of the Pacific Coast manager better than such manager himself. Plaintiff made no objection at the trial; he can urge none now. The jury believed that Fitzgerald made the agreements claimed by the defendants and they believed him when he testified that he had authority. The Court clearly instructed the jury upon the question of the authority of an agent and there was competent evidence in the record that Fitzgerald had authority to make the agreements which the defendants claim he made; that being true, the question was clearly before the jury and its decision is final.

The other question which the plaintiff in error urges in its brief is the question of alleged misconduct of the attorney for the defendants. We reiterate that this question is not before the Court. Assignment number 3, shown on page 2 of the brief of plaintiff in error is an assignment of error in failing to set aside the verdict and judgment and to grant a new trial, which, as we have seen, is not reviewable. It is not an assignment of misconduct. Plaintiff in error interprets it in its own assignment of error number 4 on page 11 of its brief and on page 81 of the brief. On page 11 of the brief plaintiff states: "The motion for a new trial should have been granted" on account of the misconduct of defendants' counsel, etc. This is clearly an assignment of error in *denying a new trial,* and not reviewable. On page 81 of the brief plaintiff in error states: "Plaintiff

made a motion for a new trial on the ground of this misconduct, *and the refusal to grant the new trial is assigned* as error." This statement by plaintiff clearly emphasizes what we have heretofore alleged, that assignment number 4 presents only the question: "Did the Court err in refusing to grant a new trial?" The ruling of the Court in this respect, as we have heretofore seen, is not reviewable and the matters which plaintiff in error urges with much vehemence on pages 60 to 81 of this brief are not properly before this Court because not assigned as error.

In the second place the Court has to examine pages 60 to 81 of the brief of plaintiff in error to find out what it is that is complained of as error. There is not a single word in assignment of error number 4, as we have heretofore noted, which indicates with the certainty required by the rules of this Court the alleged errors relied upon. How can the Court from an examination of error number 4 determine what the plaintiff in error will rely upon unless it examines the whole transcript, or is enlightened by the brief of plaintiff in error? Under all the decisions, interpreting rules similar to the rules of this Court, it is clear that the plaintiff in error has not assigned, under Rule 11, the error which it now asserts. The error is neither *separately* nor *particularly* asserted, nor *asserted at all.* Neither the *full substance* of what it is claimed was erroneously omitted or rejected is set out, *nor any of the substance thereof.* Furthermore the alleged error claimed in the brief is not an error of the Court at all. The plaintiff in error has not

complained of any ruling of the Court in any respect whatever outside of the ruling on the opening statement. All the rulings of the Court were in favor of the plaintiff in error. Furthermore, plaintiff in error seeks to allege error for matters not excepted to. The words "exception saved," shown in the fifth line on page 66 of appellant's brief was an exception taken by the *defendants in error* to the refusal of the Court to permit them to offer evidence which they considered competent.

Finally we submit that the matters referred to by plaintiff in error in its brief were not only not errors, but that the Court should have permitted the defendants in error to offer the testimony which they desired to offer.

One of the principal questions in the case was whether on December 2, 1920, when the promissory notes were made the plaintiff in error through W. G. Fitzgerald, promised to give the defendants protection against the price decline upon the goods which the defendants had purchased from the plaintiff in error, and whether, later on, it was agreed when the price decline of May 10th, 1921, occurred, that the defendants were given credit for one note. The defendants in error claimed that this agreement was made. Fitzgerald denied that he made the agreement but admitted that he told the defendants to hold up the payment of one note until they got credit upon it; admitted that he considered that they were entitled to credit upon that one note and that he recommended that they should be given

credit for this one note by the factory, which the factory subsequently refused to do. Outside of the question of authority it accordingly became an important question in the case whether when the defendants made the notes they were to be given this price protection and were subsequently given price protection to the amount of one note.

Plaintiff had sold a great amount of tires to the defendants as its distributors for a good portion of the Northwest territory, upon letters and assurances as to the fine quality of the tires. Defendants had accumulated over $20,000.00 worth of tires due to their inability in large measure to keep the tires sold. There was a gasoline shortage; there was bad weather, and worst of all, the tires proved defective and were returned in quantities by their dealers. Accordingly the defendants were unable to meet their payments when due and insisted that the factory take all the tires back. It is apparent under this situation that if the goods were warranted as of a proper quality and had proven defective that the defendants certainly had a remedy at law and nobody knew this better than the plaintiff in error.

Fitzgerald came to Portland to straighten up the matter with the defendants and it is significant that at the time he came the defendants claimed they had a right to return all the tires to San Francisco to balance their indebtedness. Fitzgerald brought with him to Portland a telegram from the home office at Akron, Ohio, which telegram was offered as defendants' Exhibit

1 (Transcript, page 57). In this telegram it is stated that Fitzgerald should "have all tires returned to San Francisco."

The correspondence which we have heretofore called attention to and which was received without objection showed that the plaintiff was having trouble with its tires throughout the country. It is certainly to be assumed that the plaintiff had a moral obligation to the defendants by reason of the failure of the tires to stand up to their represented quality, and with this situation in mind defendants claim that they made the agreement with Fitzgerald to return something over $6000.00 worth of tires to San Francisco, and they agreed to retain the balance of the tires and give notes in payment therefor with an agreement that in the event of a price decline they should get the benefit of such reduction upon the stock then retained; and they claim that later on the plaintiff through Fitzgerald agreed to give them credit to the amount of one of the notes. The correspondence in 1920 shows that tires were returned because of defects. We submit that under this situation it was competent to show the *intrinsic probability* of the making of the contract claimed by the defendants and the *reasonableness* of that contract to show not only that portion of the negotiations between the parties leading up to the making of the contract but *all* of the negotiations and the *situation as it actually existed.*

Since early days it has been held competent in the construction of written contracts to show the situation

of the parties. The Supreme Court of the United States in the case of *Nash v. Towne,* 5 Wallace 699, in 1866, stated the rule as follows:

> "Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described."

This case has been extensively followed, as may be seen from an examination of 6 Rose's Notes, Revised Edition, page 281. The same rule has been codified in Oregon as Sections 713 and 717 of Oregon Laws. Section 717 of Oregon Laws reads as follows:

> "Sec. 717. CONSTRUCTION OF INSTRUMENT. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

This rule has been followed by the Supreme Court of Oregon, in the following cases:

Feenaughty v. Beall, 91 Ore. 654, 663.

Salem King's Products Co. v. Ramp, 100 Ore. 329, 356.

Allen v. Hendrick, 104 Ore. 202, 212.
Harvey v. Campbell, 214 Pac. 348, 359.
Stanfield v. Arnwine, 102 Ore. 289, 298, 300.

The same rule is stated with reference to admissibility of evidence of the surrounding facts as to written contracts in Volume 3, Jones Commentaries on Evidence, Section 453, where this standard text writer states that courts in the construction of contracts look to the language employed, the subject matter and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed and in that view they are entitled to place themselves in the same situation as the parties who made the contract so as to view the circumstances as they now view them to judge of the meaning of the words and the correct application to the things desired. This being the well settled rule with reference to the interpretation of *written* contracts, we submit that it is infinitely more applicable with reference to an unwritten contract. In reference to the interpretation of an un-written contract, as well as to the fact of the existence of the contract itself, it is certainly competent for the Court to examine the subject matter and the surrounding circumstances, and to place itself in the same light which the parties enjoyed when it is claimed the contract was made. The proof of the quality of the tires was one of the surrounding circumstances when this contract was made. The fact is referred to time

and again in the documentary evidence received without objection, and we submit that this situation as it developed between the parties and which was in existence when the agreement was made to return the tires and make promissory notes in December, 1920, was competent evidence to be considered by the Court. As the case developed and additional correspondence was received, it seemed to the attorney for the defendants in error that in spite of prior indications of the Court to the contrary that a sufficient basis had been subsequently established to permit the introduction of this testimony; counsel for defendants in error, in the midst of the trial and uncertain what the verdict would be, felt it as his plain duty to offer testimony which he believed was competent and which would help the defendants in proving that the plaintiff made the agreement which the defendants insist actually was made in this case. The claim that these questions were asked with reference to this matter for the purpose of creating a prejudicial atmosphere is perfectly absurd in the light of the record. The attempt of plaintiff in error to claim that these isolated instances of an effort by the defendants to prove things which they considered material in this case caused a mistrial is without any foundation in fact. The rulings of the Court were in favor of the plaintiff in error and to assert that the asking of a question which the Court did not permit to be answered could have caused this jury to render an unjust verdict is an assertion that the jury did not decide this case on the evidence. The rulings of the Court in

favor of the plaintiff in error were emphatic enough so that the jury certainly could not have decided any issue involved herein upon questions which were not answered.

We repeat, however, that this question is not before this Court under the 4th assignment of error.

We respectfully submit that the judgment of the District Court should be affirmed.

CAKE & CAKE and L. A. LILJEQVIST,
Attorneys for Defendants in Error.